COURT OF APPEALS DECISION DATED AND FILED

May 26, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP445-FT

Cir. Ct. No. 2015TR6975

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

IN THE MATTER OF THE REFUSAL OF WILLIAM J. FURLONG:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM J. FURLONG,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Jefferson County: DAVID J. WAMBACH, Judge. *Affirmed.*

¶1 BLANCHARD, J.[1] William Furlong appeals an order of the circuit court concluding that Furlong unlawfully refused to voluntarily submit to a

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2013-14). Pursuant to a March 23, 2016, order of this court, the case was placed on the expedited appeals (continued)

chemical test, resulting in revocation of Furlong's driving privileges. Furlong argues that the court improperly construed Furlong's pre-test requests to confer with an attorney as a constructive refusal, which was error because there is no evidence that police informed Furlong during the pre-test discussion that Furlong did not have a right to counsel in connection with the request. I conclude that the only argument Furlong makes on appeal was rejected in ***State v. Reitter***, 227 Wis. 2d 213, 595 N.W.2d 646 (1999), which expanded on ***State v. Neitzel***, 95 Wis. 2d 191, 205, 289 N.W.2d 828 (1980), and accordingly I affirm.

BACKGROUND

¶2 No dispute matters regarding the facts found by the circuit court based on the evidence offered at Furlong's refusal hearing. I start my summary with facts involving the alleged refusal itself, because facts related to the police investigation that led to Furlong's arrest for operating a motor vehicle while intoxicated and to his transport to a police station do not matter to my resolution of the single argument now raised by Furlong.

¶3 The arresting officer read to Furlong from the "Informing the Accused" form. Throughout this reading, the officer repeatedly confirmed that Furlong understood the information on the form, including by clarifying, explaining, and answering Furlong's questions. Furlong demonstrated an understanding of the information on the form. After the officer re-read one part of

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calendar and the parties have submitted memo briefs. *See* WIS. STAT. RULE 809.17. Briefing was complete on May 10, 2016. All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

the form at Furlong's request, Furlong initially indicated that he would consent to the requested blood draw.

¶4 However, the situation changed when Furlong interrupted the officer's explanation of the next steps in the process leading up to a blood draw to say that he wanted to "lawyer up," that he wanted to talk to a lawyer before agreeing to submit to the blood test. The officer asked Furlong if that meant that he had changed his mind and no longer would agree to voluntarily provide a chemical sample. Furlong again said that he wanted a lawyer before going "any further with any of this B.S." When the officer tried to clarify whether Furlong would submit, Furlong persisted in the position that he wanted a lawyer.[2] The officer noted Furlong's conduct as a refusal.

¶5 The circuit court concluded that Furlong improperly refused the test and ordered Furlong's driving privileges revoked. Furlong appeals the refusal.

DISCUSSION

¶6 "The [circuit] court's decision that a refusal is improper is a question of law. As an appellate court, we review questions of law independently without deference to the decision of the [circuit] court." ***State v. Ludwigson***, 212 Wis. 2d 871, 875, 569 N.W.2d 762 (Ct. App. 1997).

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[2] The circuit court found that when the officer tried to clarify for a final time whether Furlong would submit to chemical testing, Furlong responded, "I'm changing it to a 'no.'" Furlong's attorney argued that what Furlong actually said was, "I'm going to change that to 'I want a lawyer.'" The circuit court concluded that either statement could constitute or contribute to a refusal finding, and I agree for the reasons stated in the Discussion section of this opinion.

¶7 Furlong's one argument on appeal is that, because the arresting officer did not advise Furlong during pre-test discussion that he did not have a right to an attorney at the pre-testing stage, Furlong's repeated requests for a lawyer cannot be construed as a refusal. It is undisputed that the officer did not so advise Furlong.

¶8 Furlong's argument rests entirely on the following sentence in a published court of appeals opinion: "Repeated requests for an attorney can amount to a refusal *so long as the officer informs the driver that there is no right to an attorney at that point*." *See* ***State v. Baratka***, 2002 WI App 288, ¶15, 258 Wis. 2d 342, 654 N.W.2d 875 (emphasis added) (citing ***Reitter***, 227 Wis. 2d at 235). I reject Furlong's argument because I agree with the State that this statement in ***Baratka*** is contradicted by pertinent statements in ***Reitter***. Obviously, the court of appeals must ignore any court of appeals precedent that conflicts with supreme court precedent. *See* ***Cuene v. Hilliard***, 2008 WI App 85, ¶15, 312 Wis. 2d 506, 754 N.W.2d 509.

¶9 The court stated in ***Reitter*** that "where a defendant exhibits no confusion, [an] officer is under no affirmative duty to advise the defendant that the right to counsel does not attach to the implied consent statute." ***Reitter***, 227 Wis. 2d at 231.[3] Further, the court in ***Reitter*** quoted an earlier opinion of the

[3] This court, in an opinion post-dating ***State v. Baratka***, 2002 WI App 288, 258 Wis. 2d 342, 654 N.W.2d 875, explained that the "confusion" to which the court refers in ***State v. Reitter***, 227 Wis. 2d 213, 595 N.W.2d 646 (1999), in the passage quoted in the text is confusion arising when an "officer explicitly assures or implicitly suggests that a custodial defendant has a right to consult counsel" at the pre-test phase, which could mislead the suspect into believing that he or she does have the right to counsel during this phase. ***State v. Verkler***, 2003 WI App 37, ¶8, 260 Wis. 2d 391, 659 N.W.2d 137. In that circumstance, this court explained, a refusal may not be conditioned on the custodial defendant's expression of an interest in conferring with an attorney. ***Id.*** However, Furlong acknowledges that there is no evidence here that the officer provided him with incorrect or misleading information such that this exception noted in ***Reitter*** could apply.

supreme court, stating that "[a] defendant who conditions submission to a chemical test upon the ability to confer with an attorney 'refuses' to take the test." ***Id.*** at 235 (quoting ***Neitzel***, 95 Wis. 2d at 205).

¶10 Delving into details of ***Reitter***, the pertinent facts match the facts here. After an officer read to Reitter from the Informing the Accused form, Reitter repeatedly said that he wanted to call his attorney. ***Reitter***, 227 Wis. 2d at 220. The officer did not directly respond to Reitter's requests for a lawyer, but instead simply explained that, if Reitter refused to take the test, his driving privileges would be revoked. ***Id.*** After the consequences of refusal were again explained to Reitter, he said, "I'm not refusing, I just want to talk to my attorney." ***Id.*** at 221. The officers informed Reitter that his "repeated requests would be noted as a refusal" and transported Reitter to jail. ***Id.*** at 221-22. There is no indication in the facts of ***Reitter*** that the officers told Reitter at any time that he did not have a right to an attorney at the pre-test stage. *See* ***id.*** at 220-22.

¶11 On these facts, our supreme court explicitly rejected Reitter's argument that the implied consent statute imposes "an affirmative duty upon police officers to advise defendants that the right to counsel does not apply to the administration of a chemical test," ***id.*** at 237-38, and rejected his argument that his "repeated requests for an attorney did not constitute an unlawful refusal." ***Id.*** at 234. Instead, the court observed that the arresting officers "correctly concluded that Reitter had no plans to take the test until he had an opportunity to speak with his attorney" and on this basis the court concluded that his "conduct constituted a constructive refusal to submit to the breathalyzer test." ***Id.*** at 237.

¶12 As in ***Reitter***, Furlong made repeated requests to consult with a lawyer before submitting to chemical testing. As in ***Reitter***, the arresting officer

here did not respond to Furlong's repeated requests by informing him that he did not have a right to counsel. Instead, as in ***Reitter***, the arresting officer here treated Furlong's repeated requests for an attorney as a refusal. *See* ***State v. Verkler***, 2003 WI App 37, ¶8, 260 Wis. 2d 391, 659 N.W.2d 137 (a defendant's expressed desire to consult with counsel before deciding whether to submit to a chemical test is "not a valid reason to refuse and an officer is on solid grounds in marking a refusal if the custodial defendant relies on this explanation for not immediately agreeing to take the ... test.").

¶13 To clarify, I would be obligated to follow ***Baratka***, as the earlier-decided case, and not ***Verkler***, if it were not for the clarity of the statements in ***Reitter*** (echoing ***Neitzel***). However, as explained above, I conclude that Furlong's only argument fails under ***Reitter***, because Furlong's repeated requests for an attorney could constitute a constructive refusal even though the arresting officer did not inform him during the pre-test stage that he did not have a right to counsel. *See* ***Reitter***, 227 Wis. 2d at 231, 234-35, 237.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.