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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0159**

Eduardo Rubio-Galarza, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

**Filed November 27, 2017
Affirmed
Smith, Tracy M., Judge**

Scott County District Court
File No. 70-CV-16-16153

Jeffrey S. Sheridan, Sheridan & Dulas, P.A., Eagan, Minnesota (for appellant)

Lori Swanson, Attorney General, Saraswati Singh, Assistant Attorney General, Cory Beth Monnens, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Smith, Tracy M., Presiding Judge; Jesson, Judge; and Smith, John, Judge.*

UNPUBLISHED OPINION

SMITH, TRACY M., Judge

Appellant Eduardo Rubio-Galarza challenges the district court's order sustaining the revocation of his driver's license, arguing that he did not refuse to submit to chemical

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

testing. Because Rubio-Galarza's uncooperative conduct frustrated the implied consent process, the court did not clearly err in finding that his behavior constituted a refusal. We affirm.

FACTS

On August 14, 2016, Prior Lake Police Officer Benjamin Erickson arrested Rubio-Galarza for driving while impaired. He also issued a citation to Rubio-Galarza's girlfriend, a passenger in the car, for underage consumption. The officer brought Rubio-Galarza to the police station. According to the officer, Rubio-Galarza was "very agitated" that his girlfriend had been cited for an offense and continued to question the officer as to why she was being charged.

The officer read aloud the Minnesota Motor Vehicle Implied Consent Advisory, and Rubio-Galarza said he understood it. The officer then repeatedly asked Rubio-Galarza if he would submit to a breath test. The officer described Rubio-Galarza as "uncooperative" during this sequence of questioning because he would "try[] to talk over" the officer and did not provide a straight yes-or-no answer to the officer's repeated question of whether he would submit to a test. At one point, Rubio-Galarza said, "[Y]es," he would submit to a breath test, "if" the officer explained why his girlfriend was being charged. In total, the officer asked Rubio-Galarza whether he would take a breath test approximately 11 times.

The officer explained that he deemed Rubio-Galarza's behavior to be a refusal "[b]ecause he would not give me a straight answer. I tried to offer him the breath test multiple times, asking him if he would take it, and he repeatedly delayed." The officer agreed that Rubio-Galarza never "specifically sa[id] no, I will not take it." When the

officer eventually asked Rubio-Galarza why he was “refusing,” Rubio-Galarza answered, “I don’t have a reason, I just want you to answer me a question. I just want to know why my girlfriend got a ticket.”

The officer never initiated the process to start the breath-test machine, nor did he present Rubio-Galarza with the mouthpiece to blow into the machine. About 15 minutes into the exchange with Rubio-Galarza, the officer handed him a notice and order of license revocation. Upon receiving the order, Rubio-Galarza asserted that he had never refused to take the test.

Rubio-Galarza sought review of the revocation of his driving privileges, and an implied-consent hearing was held. The issue at the hearing was limited to whether he refused testing. The district court found that Rubio-Galarza refused and sustained the revocation of his license.

Rubio-Galarza appeals.

D E C I S I O N

If a law-enforcement officer has “probable cause to believe [a] person was driving, operating, or in physical control of a motor vehicle” while impaired, the officer may request that the driver submit to a chemical test of the person’s blood, breath, or urine. Minn. Stat. § 169A.51, subd. 1(a)-(b) (2016). If a driver refuses to permit a test, “a test must not be given,” Minn. Stat. § 169A.52, subd. 1 (2016), but the commissioner of public safety will revoke the person’s driver’s license for one year or more. *Id.* at subd. 3(a).

Rubio-Galarza argues that the district court erred by finding that he refused to take a breath test. Whether a driver has refused to submit to chemical testing presents a question

of fact, which we review for clear error. *Stevens v. Comm’r of Pub. Safety*, 850 N.W.2d 717, 722 (Minn. App. 2014). “[R]efusal to submit to chemical testing includes any indication of actual unwillingness to participate in the testing process, as determined from the driver’s words and actions in light of the totality of the circumstances.” *State v. Ferrier*, 792 N.W.2d 98, 102 (Minn. App. 2010), *review denied* (Minn. Mar. 15, 2011). Thus, circumstantial evidence can establish unwillingness to take a test even without a direct statement of unwillingness. *Id.* at 101. If a driver commits actions that frustrate the test, the driver is considered to have refused testing. *Busch v. Comm’r of Pub. Safety*, 614 N.W.2d 256, 259-60 (Minn. App. 2000).

The district court found that Rubio-Galarza refused testing “when he would not answer whether or not he would take a test after being asked eleven times.” The district court also pointed to the fact that, during their exchange, Rubio-Galarza did not dispute the officer’s assertion that he was “refusing” the breath test. Instead, when asked why he was refusing, Rubio-Galarza responded, “I don’t have a reason, I just want you to answer me a question. I just want to know why my girlfriend got a ticket.”

Rubio-Galarza argues that he did not refuse, but rather at most withheld consent, and, he asserts, withholding consent is different from refusing under our decision in *State v. Netland*. 742 N.W.2d 207, 214 (Minn. App. 2007), *aff’d in part, rev’d in part on other grounds*, 762 N.W.2d 202 (Minn. 2009). We do not read *Netland*, which examined the constitutionality of Minnesota’s criminal-refusal statute, as altering the standard for determining whether a driver refused to submit to testing. The appropriate inquiry remains whether, under the totality of the circumstances, a driver refused testing by words or

actions. *Ferrier*, 792 N.W.2d at 102. Even the words “I withhold consent” in response to a request to submit to testing may be evidence of refusal under the totality-of-the-circumstances test.

Rubio-Galarza further argues, though, that the totality of the circumstances does not demonstrate refusal because he did not say, “No,” and he was not physically given the opportunity to blow into the machine. He contends that “the only way a law enforcement officer can know if a person is refusing when they have not specifically stated so is by starting the test sequence, presenting the mouth piece to the test subject and giving them the opportunity to provide an acceptable sample within the three-minute window permitted by the testing machine.” We disagree. Refusal may be determined by words and actions before the machine is started. *See, e.g., State v. Collins*, 655 N.W.2d 652, 658 (Minn. App. 2003) (upholding refusal when driver was uncooperative during the advisory reading), *review denied* (Minn. Mar. 26, 2003).

Sufficient evidence supports the district court’s finding that Rubio-Galarza refused to submit to testing. The officer read Rubio-Galarza the implied-consent advisory, including the portion stating that an unreasonable delay or refusal to make a decision amounts to a refusal of the test, and Rubio-Galarza indicated that he understood what the officer explained. When the officer asked Rubio-Galarza if he would submit to a breath test, Rubio-Galarza would not provide “straight answers.” Instead, “trying to talk over” the officer, he continued to ask about his girlfriend. The only “yes” answer that Rubio-Galarza ever gave was conditioned on his receiving satisfactory answers as to why his

girlfriend was cited. Rubio-Galarza refused to give an unconditional “yes” answer despite being asked approximately 11 times whether he would submit to testing.

“An officer is not required to wait for the driver to decide at his convenience whether or not he will submit to testing.” *Gabrick v. Comm’r of Pub. Safety*, 393 N.W.2d 23, 25 (Minn. App. 1986). “A reasonably prompt decision whether the driver will take the test is in keeping with the purpose of the statute to protect the public from the hazards of intoxicated drivers.” *Id.* Here, the officer was not required to wait for Rubio-Galarza to make a decision at his convenience on whether to submit to testing, nor was the officer required to answer Rubio-Galarza’s questions about his girlfriend’s citation before determining Rubio-Galarza’s answer as to whether he would submit. By asking Rubio-Galarza 11 times whether he would submit to testing, the officer gave him sufficient opportunity to decide whether or not to participate in testing. Rubio-Galarza’s words and actions demonstrated unwillingness to submit to testing, *see Ferrier*, 792 N.W.2d at 101, and frustrated the testing process, *see Busch*, 614 N.W.2d at 259-60. The district court did not clearly err in finding that Rubio-Galarza refused to submit to chemical testing.

Affirmed.