

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 23, 2006

Cornelia G. Clark
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. 2006AP204

Cir. Ct. No. 2004TR11729

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN THE MATTER OF THE REFUSAL OF MARTIN M. DUDEK:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MARTIN M. DUDEK,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Fond du Lac County:
STEVEN W. WEINKE, Judge. *Affirmed.*

¶1 SNYDER, P.J.¹ Martin M. Dudek appeals from an order finding his refusal to submit to a chemical test requested pursuant to WIS. STAT. § 343.305 to be unreasonable. Dudek contends that the circuit court erred because the officer implicitly suggested that Dudek had a right to consult with an attorney prior to deciding to take a chemical test. We conclude that no error occurred and affirm the order.

FACTS

¶2 On August 27, 2004, Dudek was arrested and issued a citation for operating a motor vehicle while intoxicated (OWI) contrary to WIS. STAT. § 346.63(1)(a). Upon arresting Dudek, Wisconsin State Patrol Trooper Cindy Paine informed him that she was going to take him to the hospital for a legal blood draw. On the way to the hospital, Dudek told Paine that his attorney had told him not to take any tests or give any samples. Paine, who had Dudek's belongings on the seat next to her, handed his cell phone back to him and suggested that he call his attorney. Dudek attempted to call his attorney, but no one answered. Dudek then made another call to someone other than his attorney. Paine told Dudek, "You are not going to chitchat while you are under arrest," and she took the phone from Dudek.

¶3 At the hospital, Paine read Dudek the Informing the Accused form and asked him if he would submit to an evidentiary chemical test of his blood. Dudek refused. Dudek was charged with refusing to submit to an evidentiary chemical test of his blood contrary to WIS. STAT. § 343.305.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶4 Dudek moved to have the refusal charge dismissed, but the circuit court denied the motion, finding Dudek's refusal to submit to a chemical test was unreasonable. Dudek appeals the circuit court's decision regarding the refusal; the OWI case remains pending.

DISCUSSION

¶5 The sole appellate issue is whether Paine implicated Dudek's right to counsel by implicitly suggesting that he had such a right and then penalizing him for relying on that suggestion. Our supreme court has held that law enforcement officers are under no affirmative duty to advise custodial defendants that the right to counsel does not apply in the implied consent setting. *State v. Reitter*, 227 Wis. 2d 213, 217-18, 595 N.W.2d 646 (1999). However, as a matter of due process, if an officer explicitly assures or implicitly suggests that a custodial defendant has a right to consult an attorney, then the officer may not thereafter denote a refusal if the defendant acts upon that assurance or suggestion. *State v. Verkler*, 2003 WI App 37, ¶1, 260 Wis. 2d 391, 659 N.W.2d 137. Dudek claims that Paine, by giving him his cell phone and allowing him to call his attorney, implicitly suggested that he had the right to counsel before deciding whether to submit to an evidentiary blood test.

¶6 In *Verkler*, the officer allowed Verkler to have a short private conversation with his law partner as a matter of courtesy and the officer exercised control of the conversation by ending it at his command. *Id.*, ¶10. The court held that the officer's action in ending the conversation was at odds with the defendant's view that the officer was honoring an attorney-client relationship. *Id.* It also found there was no testimony promising any future consultation to make up for the aborted get-together in the squad car. *Id.*, ¶11. Further, Verkler asked to

meet with his law partner several times and these requests were refused every time. *Id.*, ¶12. The *Verkler* court held that a reasonable person in the defendant's position would have come to the conclusion that he was being told there was no right to consult with a lawyer at this point in time. *Id.*

¶7 Here, Paine never advised Dudek that he had the right to consult an attorney about whether to submit to the chemical test; however, she allowed him to use his cell phone to attempt to call his attorney. Paine describes the exchange as follows:

I told him I was going to the hospital to have a legal blood draw.... [H]e told me about his attorney telling him not to take any of the tests, and I told him he could call his attorney, and I handed him his phone back, and he attempted to make a call.

The attorney did not answer.

¶8 About ten minutes later, Paine and Dudek arrived at the hospital and Paine took Dudek inside to one of the rooms where “people from the lab come down to draw the blood.” She read the Informing the Accused form to Dudek and asked if he would submit to an evidentiary chemical test of his blood. He said no. The topic of attorneys did not come up.

¶9 We observe that the rule summarized in *Verkler* includes two elements: (1) an express assurance or implicit suggestion that a right to counsel exists and (2) some demonstrated reliance by the defendant. *Id.*, ¶1 (if an officer explicitly assures or implicitly suggests that a custodial defendant has a right to consult an attorney, then the officer may not thereafter denote a refusal *if the defendant acts upon that assurance or suggestion*). Even if we were to accept, for the sake of argument, that Paine implicitly suggested to Dudek that he had the

right to counsel, we see nothing in the record to indicate that Dudek acted on any such belief once the Informing the Accused form was read to him. When it was time to make his decision about whether to submit to the blood test, Dudek made it on his own, without requesting counsel.

¶10 We acknowledge Dudek’s resort to *Goss v. Illinois*, 650 N.E.2d 1078 (Ill. App. 1995), where the arresting officer allowed Goss to call an attorney but then terminated the call shortly thereafter. *Id.* at 1078-79. The *Goss* court held that “[o]nce a person is accorded rights not required by law, the revocation of those rights will vitiate the effect of any purported refusal to submit to a breathalyzer test.” *Id.* at 1079. We reject any attempt to analogize Dudek’s situation to that in *Goss*. Goss requested to speak with an attorney just after he was read the Informing the Accused form and as he was deciding whether to submit to the test. *Id.* at 1078-79. His request to call an attorney about whether to take the breath test was granted but, shortly into the conversation, the police officer interrupted and terminated the call. *Id.* at 1079. Goss renewed his request to speak with counsel, but was denied. *Id.*

¶11 In contrast, Paine gave Dudek his phone to call his attorney while still in the patrol car, prior to arrival at the hospital, prior to Paine’s reading of the Informing the Accused form, and prior to Dudek having to decide whether or not to submit to a chemical test. Furthermore, when Paine sought Dudek’s consent to the blood test, he did not renew his request to speak to his attorney. *Goss* offers no support for Dudek.

¶12 Here, the circuit court summarized its finding as follows:

[Dudek] makes a statement that ... his attorney told him that he should never submit to any tests. Trooper Paine then says here is a phone—here is your phone. Call him if

you like. I wouldn't say that's urging. That's giving him an opportunity. This isn't like she is trying to trap him in something. He tries to make the call. It doesn't go through. Then she notes that he has dialed another number and said, Look, you are under arrest. You don't have the liberty to continue making calls to other people other than the specific right that was given to you. They then arrive at the hospital, she reads him the Informing the Accused, and he refuses.

The court's analysis is supported by *Verkler*. There, the court noted that even though the officer allowed a conversation between Verkler and his lawyer at the scene, there was no promise of any future consultation after the initial opportunity ended. *See Verkler*, 260 Wis. 2d 391, ¶11. Likewise, Paine never suggested to Dudek that he could try to contact his attorney after the unsuccessful phone attempt. She never suggested any right to consult would continue throughout the process.

CONCLUSION

¶13 We conclude that Dudek has not demonstrated that a constitutional right to counsel was ever suggested or relied upon. Even if we were to conclude that Paine implicitly suggested to Dudek that he had the right to counsel, Dudek did not act upon the suggestion at the time he was deciding whether or not to submit to the chemical test. Accordingly, the officer properly recorded a refusal and the record supports the circuit court's determination that a refusal occurred.

By the court.—Order affirmed.

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

