COURT OF APPEALS
DECISION
DATED AND FILED

November 27, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

Appeal No. 2013AP1323 **Cir. Ct. No. 2012TR3942**

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

IN THE MATTER OF THE REFUSAL OF VICTORIA M. MILEWSKI:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

VICTORIA M. MILEWSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Clark County: JON M. COUNSELL, Judge. *Affirmed*.

¶1 BLANCHARD, P.J.[1] Victoria Milewski appeals a judgment of conviction and an order revoking her operating privileges under the implied consent law, WIS. STAT. § 343.305, following her refusal to submit to a chemical test of her blood. She asks for the remedy of suppression in this refusal proceeding, on the grounds that she made a "reasonable objection" to the blood draw requested by a police officer, based on her religious beliefs. As explained below, I conclude that Milewski's legal arguments to the circuit court were, and on appeal are, misframed and wholly undeveloped. Accordingly, I affirm the decisions of the circuit court.

BACKGROUND

¶2 There are no factual disputes regarding any issue raised as part of a developed legal argument. A police officer arrested Milewski on charges that included operating a vehicle while under the influence of an intoxicant or controlled substance in violation of WIS. STAT. § 346.63(1)(a). The officer transported Milewski to a medical center for chemical testing for the presence of intoxicants or controlled substances in her blood. At the medical center, but while both of them were still in the squad car, the officer read to Milewski statutorily required information regarding the implied consent law from what is known as the "Informing the Accused" form. When the officer asked, reading from this form, if Milewski would submit to an evidentiary chemical test of her blood, Milewski stated that she would not. Milewski told the officer that she is a Christian Scientist and that her religion did not allow her to permit the intrusion of a needle into her

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(3)(c) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

body. This was the only reason Milewski provided for her refusal to submit to a blood draw; she did not tell the officer that she had a physical inability to submit to the test.

¶3 After refusing the blood draw, Milewski asked a female police officer if she could take a urine test, instead of a blood test. This officer responded that a urine test "would not be possible." There was no attempt to collect a urine sample from Milewski, but a blood sample was eventually obtained by a phlebotomist at the medical center.

¶4 Shortly thereafter, police sent Milewski a notice of intent to revoke her operating privilege due to her refusal, and Milewski timely requested a hearing on the notice.

¶5 At the refusal hearing, the court heard testimony from the arresting officer and Milewski. The court then allowed both parties to make brief arguments. Defense counsel argued that, based on ***State v. Bohling***, 173 Wis. 2d 529, 534, 494 N.W.2d 399 (1993), Milewski made a "reasonable objection to the blood draw based on her constitutionally protected beliefs" and, thus, the court should deem her refusal "reasonable." As part of this argument, defense counsel contended that Milewski's refusal was reasonable because Milewski made a "legitimate, reasonable request for an alternative test, which in this case was turned down by the officers," and because Milewski has "shown under oath that she has an honestly held religious belief that prohibited the taking of blood, that is entitled to constitutional protection." Counsel for the State argued that only certain well-defined factors, established by the implied consent law, are at issue in a refusal hearing. Because Milewski did not base a challenge on any of those

factors, the State argued that the court should conclude that her refusal was "unreasonable" under the statute.

¶6 At the close of the hearing, the circuit court determined that there was a refusal under the terms of WIS. STAT. § 343.305(9). The court explained:

> With regard to the refusal, it is actually clear that there was a refusal. Really the [issue raised by the defense] has to do with religious grounds. State v. Bohling doesn't say anything about religion. It talks about ... the issue of whether blood draws could be done without a search warrant.

However, the circuit court left open the possibility of changing its decision if Milewski could identify authority that "actually speaks to the issue of religious objections to blood draws" in the context of a refusal proceeding.

¶7 Milewski subsequently submitted a "brief in support of defendant's objection to a blood test" in which she argued that, under ***Bohling*** and an unpublished case of this court interpreting ***Bohling***, Milewski established that she had a "reasonable objection to a blood test" based on her religious beliefs. (Capitalization altered.) Due to this religious objection, Milewski argued that the court should dismiss the refusal.

¶8 The State responded to Milewski's brief, arguing that "in essence, the defense is trying to say that the [implied consent] statute is unconstitutional as applied to the defendant." The State further argued that WIS. STAT. § 806.04(11) requires notification to all parties, the court, and the Wisconsin Attorney General if a party is challenging the constitutionality of a statute. Because Milewski had not provided such notice, the State argued that the circuit court should not consider her religious objection defense.

¶9 The circuit court issued a written decision, agreeing with the State's position that "[i]t appears … that defendant is raising a constitutional objection on religious grounds as a defense to this matter." Because Milewski had not notified the Attorney General of the constitutional challenge, the circuit court determined that it did not have jurisdiction to decide the constitutional issue. In addition, the court also stated:

> As to the other evidence presented at the refusal hearing, the court finds that the officer had probable cause and lawfully arrested the defendant, the officer properly informed the defendant as required by law, that the defendant refused the test, and that the refusal was not the result of a physical inability to submit to the test. In other words, the refusal was unreasonable.

Accordingly, the circuit court entered a judgment of conviction on the refusal and an order revoking Milewski's license for refusing to submit to a chemical test of her blood in violation of the implied consent law.

¶10 Milewski moved the circuit court for reconsideration. As most pertinent to this appeal, Milewski again cited ***Bohling*** as the basis of her defense to the refusal.

¶11 The record does not indicate that the circuit court denied Milewski's motion for reconsideration in writing. However, the refusal was again raised during a subsequent motion hearing addressing separate cases arising out of the same encounter between Milewski and police. Milewski again argued that the circuit court should grant her motion for reconsideration on the refusal charge based on her religious objection. The circuit court determined that the refusal charge had previously been decided and declined to revisit it. Milewski now appeals.

DISCUSSION

¶12 I am presented with questions of law only, which call for review without any level of deference to the circuit court. *See* ***State v. Piddington***, 2001 WI 24, ¶13, 241 Wis. 2d 754, 623 N.W.2d 528.

¶13 As the State recognized and the circuit court explained in proceedings below, there is a confusing mismatch between: (1) the issues presented in this refusal hearing, and (2) the relief Milewski has sought and the basis for that request. Milewski argues on appeal that, because she made a "reasonable objection" to a blood draw by declining on religious grounds, her refusal was "reasonable" and suppression of the evidence obtained in the blood draw is required. Milewski points to ***Bohling***[2] as support for her argument for suppression that a warrantless blood draw is permissible only where, in addition to three other factors, "the arrestee presents no reasonable objection" to the blood draw. ***Bohling***, 173 Wis. 2d at 534.

¶14 However, as the circuit court explained, Milewski's reliance on ***Bohling*** is misplaced. ***Bohling*** is a Fourth Amendment case addressing *suppression*, and is not a *refusal* hearing case. When it was still good law, ***Bohling*** addressed the circumstances under which a warrantless blood draw may be unconstitutional, and therefore the evidentiary results of the draw might require

[2] While not pertinent to any issue presented as part of a developed argument in this appeal, ***State v. Bohling***, 173 Wis. 2d 529, 494 N.W.2d 399 (1993), has been abrogated by ***Missouri v. McNeely***, 133 S. Ct. 1552, 1556 (2013) (holding "that the natural metabolization of alcohol in the bloodstream does not present a per se exigency that justifies an exception to the Fourth Amendment's search warrant requirement for nonconsensual blood testing in all drunk-driving cases, and instead, that exigency in this context must be determined on a case by case basis, evaluating the totality of the circumstances").

suppression. ***Bohling*** had nothing to say about whether a person who refuses a test violates the implied consent law and is subject to revocation.[3] The only issue on appeal in the instant case, based on the arguments presented below, is whether the circuit court properly determined at Milewski's refusal hearing that Milewski violated the implied consent law by refusing to permit a blood draw. The reasonableness and constitutionality of the warrantless blood draw that occurred after Milewski violated the implied consent law are not within the scope of this refusal proceeding.

¶15 Although Milewski frames her arguments entirely in the context of the ***Bohling*** opinion, it may be that she means to make a distinct argument that, in the context of the implied consent law (rather than under the factors established in ***Bohling***), her license should not have been revoked because her refusal was reasonable. If Milewski means to make this argument, she fails to develop it, and I reject it on those grounds. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

¶16 I also reject this argument on the merits. A version of the implied consent law that predated the current version did provide that an issue at the refusal hearing was the "reasonableness" of a person's refusal. *See* WIS. STAT. § 343.305(7)(c) (1975); *see also* ***City of Madison v. Bardwell***, 83 Wis. 2d 891, 897 & n.4, 266 N.W.2d 618 (1978) (under § 343.305(7)(c) (1975), driving privileges would be suspended only if a person's refusal is "unreasonable"). This

[3] Similarly, the unpublished court of appeals case also cited by Milewski before the circuit court was an appeal from a judgment denying a motion to suppress the results of the analysis of a blood sample, not a refusal proceeding. *See* ***State v. Miller***, No. 2002AP2681-CR, unpublished slip op. (Ct. App. 2003).

"reasonableness" language was, however, abandoned when the current version of the implied consent law was recreated in 1977. ***City of Prairie Du Chien v. Evans***, 100 Wis. 2d 358, 359 n.2, 302 N.W.2d 61 (Ct. App. 1981); ***State v. Nordness***, 128 Wis. 2d 15, 27 n.5, 381 N.W.2d 300 (1986). As recreated, the implied consent law limits the subject of a refusal hearing to four issues: whether the officer had probable cause to believe that the person was operating a vehicle while under the influence of an intoxicant or controlled substance and lawfully placed the person under arrest for an OWI related violation;[4] whether the officer read the person the Informing the Accused form; whether the person refused to permit the test; and whether that refusal was due to a physical inability to submit. *See* § 343.305(9)(a)5. and (c). A physical inability to submit to a requested test is the "only reasonable ground for exonerating a refusal" under the current version of the implied consent law.[5] ***State v. Neitzel***, 95 Wis. 2d 191, 202, 289 N.W.2d 828 (1980).

¶17 Milewski does not raise any of the following potential challenges: that the officer did not have probable cause to believe she was operating under the influence or that he failed to lawfully arrest her, that the officer failed to read her

[4] I use the shorthand "OWI related violation" for a violation of the following, as set forth in WIS. STAT. § 343.305(9)(a)5.a.; WIS. STAT. §§ 346.63(1), (2), (2m), (5) or (6); 940.09(1); 940.25; or any local ordinance in conformity with those enumerated statutes.

[5] It may be that a physical inability to submit was also the only factor that would make a refusal reasonable under the 1975 version of WIS. STAT. § 343.305. *See* ***State v. Neitzel***, 95 Wis. 2d 191, 202, 289 N.W.2d 828 (1980) ("We conclude that the statutory ground for refusal, 'physical inability,' which was specifically stated in the 1977 statutes, was the only reasonable ground for exonerating a refusal under the statutes as they appeared in 1975."). In any case, a physical inability to submit is the only factor to be considered in determining whether there was a refusal under the current version of the statute.

the "Informing the Accused" form, that she did not refuse to permit the test, or that her refusal was on the grounds of physical inability.

¶18 As the State observed in the circuit court, it appears that Milewski might have been below, and is again now on appeal, attempting to present a First Amendment challenge to the implied consent law as applied to her. That is, Milewski might have meant to argue that the implied consent statutory scheme, under which her operating privilege is revoked if she refuses to permit a blood draw, impermissibly burdens her right to practice her religion according to the dictates of her conscience under the federal and state constitutions. *See, e.g.*, ***State v. Miller***, 202 Wis. 2d 56, 549 N.W.2d 235 (1996) (holding that a law that required slow-moving vehicles to display an orange slow-moving vehicle sign contravened religious belief of plaintiffs that required them to abstain from displaying secular symbols on their buggies, in violation of Wisconsin free exercise clause under the compelling-interest test). I express no opinion about the potential merits of such an argument, because it has not been clearly presented in this refusal proceeding, and certainly has not been supported by legal authority. Therefore, I have no reasonable alternative but to reject it.[6] *See* ***Pettit***, 171 Wis. 2d at 646-47. I note that the circuit court, after recognizing at the refusal hearing that Milewski was trying to raise some variety of a First Amendment-based issue within the context of this refusal action, invited her to submit additional authority and develop whatever legal argument she might have. Milewski failed to take

[6] Having decided that this argument has not been developed, I need not address whether Milewski was required, pursuant to WIS. STAT. § 806.04(11), to notify the Attorney General of a constitutional challenge to the implied consent law.

advantage of that opportunity to present pertinent legal authority and this court is not in a position to construct a legal argument on her behalf.

¶19 Separately, if Milewski means to argue that she cannot be deemed to have refused because she told the officer that she would submit to a urine test instead of a blood draw, she again fails to develop this argument. Moreover, this argument would fail on its merits. Under the implied consent law, the officer had the discretion to seek a blood, breath, or urine test, and he was not required to comply with Milewski's request to take a urine test instead of a blood test. *See* WIS. STAT. § 343.305(2) (the law enforcement agency "may designate which of the tests shall be administered first"); ***State v. Krajewski***, 2002 WI 97, ¶55, 255 Wis. 2d 98, 648 N.W.2d 385 ("In enacting the implied consent statute, the legislature authorized a law enforcement officer to request his or her choice among [the] three chemical tests" authorized in § 343.305(2).). Whether the blood draw subsequent to Milewski's refusal failed to comply with the ***Bohling*** factors because Milewski requested a urine test on the grounds that her religious belief forbade her from consenting to a blood draw is, again, a question not within the scope of this appeal.

CONCLUSION

¶20 For the reasons above, I affirm the circuit court's judgment of conviction and the order revoking Milewski's license.

By the Court.—Judgment and order affirmed.

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