COURT OF APPEALS
DECISION
DATED AND RELEASED

MARCH 18, 1997

No. 96-2736

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DONALD E. BIESECKER,

Defendant-Appellant.

APPEAL from an order of the circuit court for Eau Claire County: GREGORY A. PETERSON, Judge. *Affirmed.*

LaROCQUE, J. Donald Biesecker appeals an order imposing penalties based upon a finding that he refused a chemical test of his blood in violation of Wisconsin's implied consent law, § 343.305, STATS. Biesecker contends that the evidence is insufficient to establish a refusal. This court affirms.

The facts are not in dispute. Biesecker was arrested for OWI, and the arresting officer drove him to a local hospital for the purpose of administering a blood test to determine his blood alcohol content. The officer testified regarding the "numerous" inquiries he made of Biesecker whether he would take the test:

> After asking him several times ... He told me such things as so why should I be this insane to consider this. When asked another time, he stated I've got an option to seek legal counsel. When asked another time, he stated that it seems like this is a big hanging point; I don't think I will. ... [B]ased upon the remarks that he made, that he didn't think he would, I marked Mr. Biesecker as a refusal.

According to the officer, he advised Biesecker that he was "marking the test down as ... a refusal." Because this was a second OWI offense making it a crime, the officer then took Biesecker into the hospital and told him that he would take blood as a search incident to an arrest. Biesecker cooperated with the technician and a blood test was taken.

Findings by a trial court are not to be set aside on appeal unless they are clearly erroneous. Section 805.17(2), STATS. Whether those facts fulfill a particular legal standard presents a question of law the appeals court reviews do novo. ***Nottelson v. DILHR***, 94 Wis.2d 106, 116, 287 N.W.2d 763, 768 (1980).

This court concludes that the evidence supports the court's finding and satisfies the standard required to constitute a refusal under the implied consent law. Biesecker gave repeated indications of his unwillingness to take the test. The officer advised him that his conduct would constitute a refusal. It is unnecessary that a subject unequivocally articulate a verbal "No" to the question whether he will consent to the test in order to constitute a refusal under the implied consent law. The implied consent law is to be liberally construed to effectuate its policies. ***Scales v. State***, 64 Wis.2d 485, 494, 219 N.W.2d 286, 292 (1974). The law was intended to facilitate the taking of tests for intoxication and not to inhibit the ability of the State to remove drunken drivers from the highway. ***Id.***

As a matter of fortuity in the present situation, the refusal took place at a hospital. The officer was able to obtain a blood test as a search incidental to arrest, despite the refusal. However, if Biesecker's conduct in this case were construed as insufficient to constitute refusal, it could thwart the acquisition of evidence in different circumstances. The result would be inconsistent with the legislature's intent in enacting the implied consent law.

By the Court.—Order affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.