COURT OF APPEALS
DECISION
DATED AND FILED

January 28, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2129

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ALANNA J. KIRT,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Manitowoc County: FRED H. HAZLEWOOD, Judge. *Affirmed.*

BROWN, J. Alanna J. Kirt appeals from an order revoking her operating privileges for refusing to submit to chemical testing. The issue is whether Kirt refused to take a test under § 343.305(3)(a), STATS., when she delayed her consent until ten minutes after being originally asked to submit it. The law in Wisconsin is that the obligation of the accused is to take the test

promptly or refuse it promptly. She did not submit to chemical testing promptly. We hold that she has refused and affirm the order.

Because the facts are undisputed, the issue is one of law. *See* ***State v. Williams***, 104 Wis.2d 15, 21-22, 310 N.W.2d 601, 604-05 (1981). We resolve such issues without deference to the trial court. *See* ***Ball v. District No. 4, Area Bd.,*** 117 Wis.2d 529, 537, 345 N.W.2d 389, 394 (1984).

Kirt's car was stopped and she was subsequently arrested for operating while intoxicated. At the station, an officer asked her to submit to a chemical test. The primary test was a blood test. She responded that she had a fear of needles and would rather take a breath test. The officer told her, however, that if he did not receive a yes or no answer that she would submit to the blood test, he would mark her as refusing to submit to a chemical test. About ten minutes after originally being asked to take the test, she informed the officer that she was willing to submit to a chemical test of her blood. But the officer had already marked Kirt as having refused.

Kirt contended in her brief-in-chief that "Wisconsin has not ruled on whether a subsequent rescission acts to cure an initial refusal." She then cited to cases in other jurisdictions holding that a person can rescind an original refusal if made within a reasonable period of time such that a valid test can still be taken. Applying those cases, she argued that while her equivocal conduct constituted an initial refusal, she rescinded that refusal within a reasonable time. However, although she did not file a reply brief, she later acknowledged by letter that a recent decision of our court, ***State v. Rydeski***, No. 97-0169-CR (Wis. Ct. App. Oct. 2, 1997, ordered published Nov. 19, 1997), impacted upon the issue.

Rydeski controls the issue and there is no need to turn to foreign jurisdictions. There, this court wrote:

> [W]e conclude that once a person has been properly informed of the implied consent statute, that person must promptly submit or refuse to submit to the requested test, and that upon a refusal, the officer may "immediately" gain possession of the accused's license and fill out the Notice of Intent to Revoke form. A person's refusal is thus conclusive and is not dependent upon such factors as whether the accused recants within a "reasonable time," whether the recantation comes within the three-hour time period provided in § 885.235(1), Stats., or whether administering the test at a later time would inconvenience the officer or result in a loss of the test's evidentiary value.

Rydeski, slip op. at 3.

Even if ***Rydeski*** were not on the books, this court would still affirm. In ***State v. Neitzel***, 95 Wis.2d 191, 205, 289 N.W.2d 828, 835 (1980), our supreme court stated: "Once there has been a proper explanation and there has been a refusal, even though that refusal is conditioned on the accused's willingness to *reconsider* ... a refusal has occurred under the statute and the accused is subject to the consequence of a mandatory suspension." (Emphasis added.) The court went on to say that the "obligation of the accused is to take the test promptly or to refuse it promptly. If [she] refuses, the consequences flow from the implied consent statute." ***Id.*** And in ***State v. Stary***, 187 Wis.2d 266, 271, 522 N.W.2d 32, 35 (Ct. App. 1994), this court wrote that "the officer is not under a continuing obligation to remain available to accommodate future requests." In this court's view, ***Rydeski*** is the natural outgrowth of the supreme court's statements in ***Neitzel*** and this court's observation in ***Stary***. The order of revocation for unreasonably refusing to take the chemical test is affirmed.

By the Court.—Order affirmed.

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