COURT OF APPEALS
DECISION
DATED AND FILED

September 10, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP285 **Cir. Ct. No. 2008TR7549**

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

IN THE MATTER OF THE REFUSAL OF LAWRENCE H. GOSDECK, JR.:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LAWRENCE H. GOSDECK, JR.,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Jefferson County: WILLIAM F. HUE, Judge. *Affirmed.*

¶1 BRIDGE, J.[1] Lawrence Gosdeck appeals from an order of the circuit court ruling that Gosdeck unlawfully refused to submit to evidentiary

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

chemical testing, in violation of Wisconsin's implied consent law, WIS. STAT. § 343.305(9). In his main brief, Gosdeck advances a variety of policy arguments as to why his refusal to indicate to police whether he was willing or unwilling to submit to testing under the implied consent law should not be construed as a refusal. We conclude that Gosdeck's policy arguments are unpersuasive and run afoul of the requirements of § 343.305(9). We therefore affirm.

BACKGROUND

¶2 The following facts are taken from the refusal hearing and are substantially undisputed. On December 16, 2008, Jeff Hottman, an officer with the City of Fort Atkinson, pulled over a vehicle driven by Gosdeck after Gosdeck committed several traffic violations. Upon approaching the vehicle, Hottman observed that Gosdeck's eyes appeared red and glassy, his speech was slurred, and there was a strong odor of intoxicants coming from the vehicle. When questioned, Gosdeck admitted "having a couple" of alcoholic beverages.

¶3 Hottman testified that he asked Gosdeck to perform field sobriety tests, but that Gosdeck stated something to the effect of "I won't do anything." Hottman asked Gosdeck if he was refusing to perform the field sobriety tests, and Gosdeck indicated that he was. Hottman then placed Gosdeck under arrest for operating a motor vehicle while under the influence of an intoxicant.

¶4 Hottman transported Gosdeck to the Fort Atkinson police department where he read Gosdeck the Informing the Accused form. After reading Gosdeck the form, Hottman asked Gosdeck if he would submit to an evidentiary chemical test. Gosdeck did not respond. Hottman repeated the question a number of times but received no response from Gosdeck. Hottman informed Gosdeck that he would construe Gosdeck's silence as a "no" to the

question and a refusal to submit to the chemical test. Gosdeck did not respond. Hottman testified that during this exchange, Gosdeck was sitting with his head down between his legs and that he was looking at the floor. Hottman also testified that prior to reading Gosdeck the form, Gosdeck was communicative and would respond to questions.

¶5 At the refusal hearing, Gosdeck disputed whether his conduct could be construed as a refusal to submit to testing. He argued that it was not clear from Hottman's description of his demeanor and positioning at the time that his refusal to answer Hottman's questions was a willful attempt to defeat the evidentiary chemical test. He also argued that his passive, non-assertive behavior cannot be construed as a "no" answer. He argued instead that a defendant's refusal must involve actual, affirmative conduct. In addition, he argued that for policy reasons, he should not be deemed as having refused testing under the circumstances. The circuit court disagreed with Gosdeck and concluded that in this situation, Gosdeck's silence and conduct constituted a refusal. Gosdeck appeals.

DISCUSSION

¶6 Under the Wisconsin's implied consent law, every Wisconsin driver is deemed to have consented to chemical testing for the purpose of determining the presence or quantity of alcohol in his or her blood or breath. WIS. STAT. § 343.305(2). A person may revoke this consent by refusing to submit to testing. *See* WIS. STAT. § 343.305(9) and ***County of Ozaukee v. Quelle***, 198 Wis. 2d 269, 277, 542 N.W.2d 196 (Ct. App. 1995) (abrogated on other grounds). If a driver refuses to be tested, the officer must confiscate his or her driver's license and issue a notice of intent to revoke the driver's operating privileges. *See* WIS. STAT. § 343.305(9). The driver may, however, request a hearing on his or her refusal.

Id. At the refusal hearing, the issues are limited to: (1) whether the officer had probable cause to believe the defendant operated his or her motor vehicle while intoxicated; (2) whether the officer properly informed the defendant under the implied consent law; and (3) whether the defendant refused chemical testing. WIS. STAT. § 343.305(9)(a)(5). The only contested issue here is whether Gosdeck refused the testing. We review independently the question of whether a defendant unlawfully refused. ***State v. Ludwigson***, 212 Wis. 2d 871, 875, 569 N.W.2d 762 (Ct. App. 1997).

¶7 In his main brief, Gosdeck does not argue that his refusal to answer whether he was willing to submit to chemical testing when asked the question multiple times *cannot* be construed as a "no" and a refusal to submit to testing under the facts of this case. He contends instead that for a variety of policy reasons his refusal to answer *should not* be construed as a refusal to submit to testing. He argues, for example, that the goal of the automatic driver's license suspension for refusal, which he claims is the fostering of successful prosecutions,[2] has "to a great extent, [been] rendered an anachronism" following ***State v. Bohling***, 173 Wis. 2d 529, 545-46, 494 N.W.2d 399 (1993) (Abrahamson, C.J., dissenting). In ***Bohling***, the supreme court held that the dissipation of alcohol from a person's blood stream is a sufficient exigency justifying a warrantless blood draw. ***Id.*** at 547. Gosdeck also argues that in situations where an offender's refusal to submit to testing is disputed, it is advantageous to the State if an offender is found not to have refused. He claims

[2] In ***State v. Brooks***, 113 Wis. 2d 347, 355, 335 N.W.2d 354 (1983), the supreme court explained that the purpose of the implied consent law is to obtain evidence of a person's blood alcohol content in order to prosecute drunk drivers and improve the rate of their conviction.

that the successful prosecution of offenders is more likely if they are found not to have improperly refused because the chemical testing is automatically admissible under WIS. STAT. § 343.305(5)(d) when an offender voluntarily submits to the test, meaning the State is not required to prove the underlying accuracy and reliability of the testing method. Finally, without additional explanation, Gosdeck argues that offenders will be removed from the road as quickly or even more quickly if they are deemed to have consented to testing.

¶8 The language of WIS. STAT. § 343.305(9) regarding refusals to submit to testing is plain and unambiguous, and as such we are bound by the statutory language unless such interpretation leads to an absurd result, something Gosdeck does assert. *See* ***South Milwaukee Sav. Bank v. Barczak***, 229 Wis. 2d 521, 536-37, 600 N.W.2d 205 (Ct. App. 1999). Because courts have the adjudicative role of applying the plain statutory language to the facts at hand, Gosdeck's arguments as to why a change in policy regarding refusals is fitting are more appropriately addressed to the Legislature, the policy making body. *See, e.g.*, ***State v. Endicott***, 245 Wis. 2d 607, 624, 629 N.W.2d 686 (2001) (Bradley, J., dissenting).

¶9 In his reply brief, Gosdeck argues for the first time on appeal that his conduct *cannot* be construed as a refusal to submit to testing.[3] An appellant who fails to discuss an alleged error in its main brief may not do so in its reply brief. ***State v. Marquardt***, 2001 WI App 219, ¶14 n.3, 247 Wis. 2d 765, 635 N.W.2d

[3] Gosdeck contends in his reply brief that he raised in his main brief the argument that his conduct cannot be construed as a refusal. The argument in his main brief, however, pertained to the policy reasons why he should not be deemed as having refused and not why his conduct cannot be construed as refusing.

188. Moreover, although he asserts that his conduct did not constitute a refusal, he does not explain why. Instead, his argument is limited to explaining why his main brief should be read as arguing the issue. In the end, neither his main brief nor his reply brief explain to this court why his conduct did not constitute a refusal. We therefore do not address this issue. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals need not address arguments that are inadequately developed).

¶10 For the reasons stated above, we affirm the order of the circuit court.

By the Court.—Order affirmed.

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