

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 11, 2001

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. 01-2035
STATE OF WISCONSIN**

Cir. Ct. No. 01-TR-1471

**IN COURT OF APPEALS
DISTRICT III**

**STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PATRICIA A. ZIEBELL,

DEFENDANT-APPELLANT.**

APPEAL from an order of the circuit court for Shawano County:
EARL SCHMIDT, Judge. *Reversed and cause remanded with directions.*

¶1 CANE, C.J.¹ The sole issue on appeal is whether the circuit court erroneously exercised its discretion when it denied Patricia Ziebell's motion to dismiss the charge for refusing to take a blood alcohol test after she pled guilty to

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

the underlying charge of operating a motor vehicle while under the influence of an intoxicant. Because the circuit court applied an incorrect standard of law when exercising its discretion, the order is reversed and the matter is remanded to the trial court.

¶2 The facts are undisputed. A Shawano County sheriff's deputy arrested Patricia Ziebell for OWI. The deputy transferred her to the Shawano Medical Center where the deputy read Ziebell the Informing the Accused form. When asked if she would submit to a chemical test of her blood, she said no. Consequently, a Notice of Intent to Revoke was issued and Ziebell requested a refusal hearing.

¶3 Ziebell then filed a motion to dismiss the refusal charge. On the date of the refusal hearing, the State indicated that it would move to dismiss the refusal charge upon the entry of a guilty plea to the OWI charge. Ziebell pled guilty to the OWI charge and moved the trial court to dismiss the refusal charge in light of her guilty plea, citing *State v. Brooks*, 113 Wis. 2d 347, 335 N.W.2d 354 (1983). The court accepted Ziebell's guilty plea to the OWI charge and imposed the appropriate sanctions. However, the court denied Ziebell's motion to dismiss the refusal charge, and the matter proceeded with a refusal hearing. The court found the refusal unreasonable and revoked Ziebell's license.

¶4 In its denial, the court stated:

I really believe that that was a correct move when the legislature separated out the refusal to a separate hearing from the underlying action. It certainly promoted considerable improvements in the enforcement of this law against drinking and driving, and I think to dismiss it is not, would not, is not consistent with good public policy. So the court is not going to dismiss the refusal.

¶5 Ziebell contends that the court's reasoning is directly contrary to the prevailing interpretation of the purpose for refusal hearings as stated in *Brooks*. She reasons that because the court applied the incorrect standard of law, it failed to reasonably exercise its discretion. See *State v. Lipke*, 186 Wis. 2d 358, 366, 521 N.W.2d 444 (Ct. App. 1994). We agree.

¶6 In *State v. Banks*, 105 Wis. 2d 32, 48-50, 313 N.W.2d 67 (1981), the supreme court held that it is a legitimate public purpose for the legislature to provide incentives for taking the blood alcohol test by punishing those persons who refuse to take it. Later, in *Brooks*, 113 Wis. 2d at 354-55, the supreme court held that revocation is a sanction for refusal to take a blood alcohol test. It observed that the blood alcohol test is mandatory in Wisconsin unless there is a proper basis not to take it. See WIS. STAT. § 343.305(1) and (8). The supreme court reasoned that implied consent to take the test is "needed to improve the rate of convictions so that those who drive while intoxicated [will] be punished." *Brooks*, 113 Wis. 2d at 355. By refusing the test, the defendant deprives the State of relevant evidence to which it is entitled.

¶7 The legislature has twin goals in its pursuit of the intoxicated driver: to punish those who are convicted of intoxication related offenses and also to punish those who improperly fail to comply with the implied consent law. *Id.* But, the *Brooks* court continued:

The accurate, scientific evidence of blood-alcohol level is to be used to secure convictions. However, when an individual pleads guilty to OWI, there is no longer a need for such evidence. The conviction has been secured. The court has imposed the legislatively chosen penalty on the offender. Thus, the ultimate purpose of the implied consent law—successful prosecution of drunk drivers—has been accomplished. Accordingly, it was appropriate to dismiss the refusal proceeding. In a sense, the driver has made up

for his refusal by cooperating with the authorities in pleading guilty.

Id. at 356.

¶8 The *Brooks* court concluded:

The general purpose behind the laws relating to operating while under the influence of intoxicants and implied consent to take alcohol tests—to get drunk drivers off the road as expeditiously as possible and with as little possible disruption of the court's calendar—is best served by the exercise of discretion in the dismissal of a refusal case once there has been a plea of guilty to the OWI charge.

Id. at 359. The supreme court stressed that the power to dismiss is a discretionary one. “There may be circumstances where the court may conclude in a particular case not to dismiss the refusal charge although a plea of guilty to OWI has been taken. Whether such refusal to dismiss can be justified as a proper exercise of discretion *will be dependent upon the ambience of the particular case.*” *Id.* (emphasis added).

¶9 Thus, our supreme court directed the circuit court to exercise its discretion by examining the particular circumstances of each case. There may be circumstances justifying a denial to dismiss the refusal charge after a defendant has entered a guilty plea to the underlying OWI offense, but that will depend upon the particular surrounding circumstances of each case. Here, rather than looking at the circumstances of this case, the court stated as its reasons for refusing to dismiss the charge general policy reasons nearly identical to those rejected by the supreme court in *Brooks*. Consequently, this court has no alternative but to reverse the trial court’s denial because it applied a legal standard contrary to that enunciated in *Brooks*. Accordingly, this court reverses the trial court’s order

denying the motion and remands the matter to the trial court to exercise its discretion applying the principles stated in *Brooks*.

By the Court.—Order reversed and cause remanded with directions.

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

