

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 15, 2003

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. 02-2553
STATE OF WISCONSIN**

Cir. Ct. No. 02-TR-155

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

RICHARD STOECKEL,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Washburn County:
EUGENE D. HARRINGTON, Judge. *Affirmed.*

¶1 PETERSON, J.¹ Richard Stoeckel appeals an order revoking his operating privileges based on his refusal to submit to chemical testing. He argues that even though he stated he would not submit to testing, he did not refuse

¹ This appeal is decided by one judge pursuant to § 752.31(2). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

because he produced a piece of paper at the arrest scene stating he would submit to chemical testing. We disagree and affirm the order.

BACKGROUND

¶2 On January 4, 2002, state trooper Patrick Kraetke stopped Stoeckel in Washburn County after he observed Stoeckel cross the centerline and then quickly “jerk” back and cross the fog line. As Kraetke approached the vehicle, Stoeckel got out and met Kraetke at the rear of the vehicle. Kraetke asked Stoeckel for his driver’s license, which Stoeckel produced. When Kraetke asked if Stoeckel had been drinking, Stoeckel responded that he “had a few.” Kraetke then asked Stoeckel to get back into his car.

¶3 Kraetke returned to his squad to radio in the driver’s license and license plate numbers. Because the license plate was covered with snow, Kraetke went to wipe the snow off the plate. Stoeckel got out of his vehicle and handed Kraetke a piece of paper that he said he wanted Kraetke to see. Kraetke read the paper,² handed it back to Stoeckel, and returned to his car. Stoeckel also returned to his vehicle.

² The paper read:

OFFICER, PLEASE UNDERSTAND:

(continued)

¶4 Kraetke then reapproached Stoeckel's vehicle and asked Stoeckel to take field sobriety tests. Stoeckel responded that he would rather not and referred Kraetke to the paper, which Kraetke read out loud. When Stoeckel refused to submit to field tests, Kraetke arrested him for operating while under the influence.

¶5 Kraetke transported Stoeckel to the Washburn County Sheriff's Department, where he read Stoeckel the Informing the Accused form. When Kraetke asked if Stoeckel would submit to chemical testing, Stoeckel responded "No." He then stated he wanted to go back to the piece of paper he had shown

You have informed me that I am under suspicion for operating a motor vehicle while impaired by alcoholic beverages and/or drugs and/or operating a motor vehicle with a prohibited alcohol concentration. I will be cooperative in your investigation but I realize that I am not legally required to submit to any Field Sobriety Tests (FSTs) or to submit to a hand held breath testing device or Preliminary Breath Test (PBT) at the roadside or elsewhere. If I elect not to submit to any Field Sobriety Tests and/or to take a PBT I request that you abide by my decision and not attempt, in any way, to force or pressure me to complete said FSTs.

Under Wisconsin's Implied Consent law I will submit to the evidentiary chemical testing of my blood, breath or urine and will submit to the primary chemical test utilized by this law enforcement agency.

I am requesting that you provide me with the alternative test that this law enforcement agency is prepared to give. I understand that I will have to pay for an alternative test conducted by a qualified person of my own choice; if I so choose, however, this law enforcement agency must provide its alternative test free of charge.

I further refuse to answer any questions regarding what or how much I may or may not have had to drink and respectfully decline to provide any information to be used in completing an Alcohol Influence Report or other questionnaire.

If I am not under arrest, I want to leave. If I am free to leave, advise me immediately so that I may go about my business.

Kraetke at the arrest scene. After some discussion about the paper, Stoeckel stated he wanted to rely on the paper. Kraetke again asked if he would submit to chemical testing, and Stoeckel again said he would not. Kraetke marked this as a refusal.

¶6 Stoeckel was issued a citation for operating while intoxicated and a notice of intent to revoke operating privileges. Stoeckel filed a request for a refusal hearing. At the hearing, the court determined that Stoeckel refused to submit to chemical testing. Consequently, Stoeckel's driving privileges were revoked. Stoeckel appeals.

STANDARD OF REVIEW

¶7 Stoeckel argues he did not refuse to submit to chemical testing. The application of the implied consent statute to found facts is a question of law we review independently. *State v. Rydeski*, 214 Wis. 2d 101, 106, 571 N.W.2d 417 (Ct. App. 1997). To the extent the circuit court's decision involves findings of evidentiary facts, those findings will not be overturned unless they are clearly erroneous. *State v. Eckert*, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996).

DISCUSSION

¶8 Stoeckel orally responded "no" when asked if he would submit to the testing. However, he argues he did not refuse chemical testing because he presented the paper that specifically said he would submit to the testing. He also contends that he responded "yes, yes, yes" after Kraetke read the Informing the Accused, indicating a willingness to submit to testing.

¶9 We are not persuaded by Stoeckel’s argument. After reading Stoeckel the Informing the Accused, Kraetke asked Stoeckel whether he would submit to chemical testing. Stoeckel responded he would not. Stoeckel then stated that he would like to refer to the paper. After some discussion about the paper, during which Kraetke stated the paper had no effect, Kraetke again asked Stoeckel if he would submit to testing and Stoeckel again said he would not. Kraetke asked if he was refusing, and Stoeckel responded, “Yes.”³

¶10 Although Stoeckel argues he stated “yes, yes, yes” when read the Informing the Accused, our review of the record shows that when directly asked more than once if he would submit, Stoeckel stated he would not.⁴ We therefore conclude that the trial court did not erroneously exercise its discretion by determining that Stoeckel never agreed to take the test. Indeed, no sample of Stoeckel’s blood, breath or urine was ever taken. Any failure to submit to chemical testing constitutes a refusal. See *Rydeski*, 214 Wis. 2d at 106.

³ Kraetke initially checked the “Yes” box indicating that Stoeckel agreed to submit to testing. He then crossed it out, marked the “No” box indicating refusal, and wrote his initials next to it. Kraetke testified that he had made a mistake, while Stoeckel argues that this shows he did consent to testing. The trial court determined that Kraetke had indeed simply made a mistake. When the trial court acts as the finder of fact, it is the ultimate arbiter of the credibility of the witnesses and of the weight to be given to each witness’s testimony. *Plesko v. Figgie Int’l*, 190 Wis. 2d 764, 775, 528 N.W.2d 446 (Ct. App. 1994). A trial court’s findings of fact shall not be set aside unless they are clearly erroneous. WIS. STAT. § 805.17(2).

⁴ In fact, the record shows it is actually Kraetke who quotes Stoeckel as saying “yes, yes, yes.” This appears to refer to Stoeckel stating “okay” multiple times as Kraetke read the Informing the Accused. The record demonstrates that Stoeckel was simply acknowledging what was being read to him, not agreeing to submit.

Consequently, the trial court was correct in its determination that Stoeckel refused chemical testing.⁵

By the Court.—Order affirmed.

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

⁵ The State also argues that Stoeckel was uncooperative in his continued reliance on the paper, and that this conduct amounts to a refusal. However, because we conclude that Stoeckel orally refused the testing, we need not reach this issue.

