

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 6, 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. 03-0763
STATE OF WISCONSIN**

Cir. Ct. No. 01CT000611

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JAMES B. FOGLE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Fond du Lac County:
ROBERT J. WIRTZ, Judge. *Affirmed.*

¶1 SNYDER, J.¹ James B. Fogle appeals from an order finding his refusal to submit to a chemical test of his blood unreasonable. Fogle argues that the circuit court applied an inappropriate standard in interpreting the law to require

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

actual medical harm to the accused before a refusal is deemed reasonable. Fogle argues that he reasonably refused the blood test out of his fear of needles. We disagree and affirm the order of the circuit court.

FACTS

¶2 On November 10, 2001, Fogle was stopped, detained and arrested for operating a motor vehicle while intoxicated. After his arrest, Fogle was transported to a hospital by Officer R. West of the City of Fond du Lac Police Department where West asked Fogle to submit to a chemical test of his blood for purposes of determining blood alcohol concentration. Fogle refused to submit to the test on the grounds that he had a fear of needles that caused him to pass out. West thereafter prepared a Notice of Intent to Revoke Operating Privilege form charging Fogle with an unreasonable refusal.

¶3 Fogle was charged with unreasonably refusing to submit to a chemical test requested pursuant to Wisconsin's Implied Consent Law. Fogle, through counsel, requested a hearing on the reasonableness of his refusal. The refusal hearing was held on November 18, 2002. At the hearing, Fogle testified as to his fear of needles and also to an incident in which he passed out after receiving a flu shot. Fogle's fiancée also testified regarding Fogle's fear of needles. Fogle moved to dismiss the refusal charge on the grounds that he has a fear of needles.

¶4 The circuit court stated:

I find that the stated reason by Mr. Fogle, that he has a fear of needles and, further, that he once passed out from a flu shot ... [does not] rise to the level of a physical inability, nor a disease or physical disability to give the blood....

[T]here isn't any rational, objective reason for his fear of needles in this instance.

By order dated December 19, 2002, the circuit court revoked Fogle's operating privileges for three years. Fogle appeals.

DISCUSSION

¶5 Application of the implied consent statute to an undisputed set of facts is a question of law that we review independently. *State v. Piddington*, 2001 WI 24, ¶13, 241 Wis. 2d 754, 623 N.W.2d 528. Fogle argues that the circuit court applied an inappropriate standard by interpreting the law to require an actual medical harm to the accused before a refusal is deemed reasonable. Fogle argues that his refusal was reasonable because he proved that he had a physical manifestation of fear of needles and that his fear of needles was great enough to justify the refusal. *State v. Krajewski*, 2002 WI 97, 255 Wis. 2d 98, 648 N.W.2d 385, *cert. denied*, ___ U.S. ___, 123 S. Ct. 704 (U.S. Dec. 16, 2002) (No. 02-719), directly addressed, and directly rejected, this exact argument.²

¶6 In WIS. STAT. § 343.305, Wisconsin has enacted an implied consent statute for motor vehicle operators. Section 343.305(2) states:

IMPLIED CONSENT. Any person who is on duty time with respect to a commercial motor vehicle or drives or operates a motor vehicle upon the public highways of this state, or in those areas enumerated in s. 346.61, is deemed to have given consent to one or more tests of his or her breath, blood or urine, for the purpose of determining the presence or quantity in his or her blood or breath, of alcohol, controlled substances, controlled substance analogs or other

² We find it somewhat disingenuous for Fogle's attorneys to raise the issue of fear of needles as a reasonable basis for refusal to submit to a blood test when that issue has been answered directly through *State v. Krajewski*, 2002 WI 97, 255 Wis. 2d 98, 648 N.W.2d 385, *cert. denied*, ___ U.S. ___, 123 S. Ct. 704 (U.S. Dec. 16, 2002) (No. 02-719), a case cited directly by the State. Fogle's attorneys were the appellate counsel in *Krajewski* and do not even bother to respond to the State's reliance on that case in the reply brief.

drugs, or any combination of alcohol, controlled substances, controlled substance analogs and other drugs, when requested to do so by a law enforcement officer under sub. (3)(a) or (am) or when required to do so under sub. (3)(b). Any such tests shall be administered upon the request of a law enforcement officer. The law enforcement agency by which the officer is employed shall be prepared to administer, either at its agency or any other agency or facility, 2 of the 3 tests under sub. (3)(a) or (am), and may designate which of the tests shall be administered first.

There is an exception to this implied consent provided in § 343.305(9)(a)5.c which states that a “person shall not be considered to have refused the test if it is shown by a preponderance of evidence that the refusal was due to a physical inability to submit to the test due to a physical disability or disease unrelated to the use of alcohol, controlled substances, controlled substance analogs or other drugs.” This section does not define what constitutes a “physical disability” that would exempt a person from submitting to a blood test.

¶7 *Krajewski* clarified this issue. The Wisconsin Supreme Court found that a warrantless nonconsensual blood draw from a person arrested on probable cause for a drunk driving offense is constitutional based on the exigent circumstances to the Fourth Amendment, even if the person offers to submit to a chemical test other than the blood test chosen by law enforcement. *Krajewski*, 255 Wis. 2d 98, ¶3. In *Krajewski*, the defendant testified that he had a fear of needles and did not want to have blood drawn but instead offered to provide a breath or urine sample. *Id.*, ¶9.

¶8 Wisconsin’s Implied Consent Law does not afford the driver the right to choose which test will be administered. See *State v. Wodenjak*, 2001 WI App 216, ¶12, 247 Wis. 2d 554, 634 N.W.2d 867 review denied, 2001 WI 117, 247 Wis. 2d 1036, 635 N.W.2d 784 (Wis. Oct. 23, 2001) (No. 00-3419-CR). Any objection to the test requested by the law enforcement officer requires a valid

excuse of a medical or physical nature before the person may properly refuse. *See* WIS. STAT. § 343.305(9)(a)5.c. In *Krajewski*, the supreme court found that a fear of needles does not meet this requirement:

We think this provision [§ 343.305(9)(a)5.c] represents a valid standard to apply in situations outside the statute. It is a standard that will permit a different chemical test for a person who shows that he or she is a hemophiliac or suffers from some other ailment that renders him or her unable to reasonably submit to a blood test. *Krajewski* has not satisfied this standard.

Krajewski, 255 Wis. 2d 98, ¶52.

¶9 Like *Krajewski*, Fogle expressed a fear of needles but did not demonstrate that he was a hemophiliac or suffered from some other ailment that rendered him unable to reasonably submit to a blood test. Pursuant to *Krajewski*, this was not a reasonable refusal. We therefore 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.

