COURT OF APPEALS
DECISION
DATED AND FILED

January 19, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-2005 **Cir. Ct. No. 04TR003917**

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

IN THE MATTER OF THE REFUSAL OF MICHAEL A. CURRY:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL A. CURRY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Winnebago County: SCOTT C. WOLDT, Judge. *Affirmed.*

¶1 BROWN, J.[1] Michael A. Curry appeals an order finding that he improperly refused to take a blood alcohol test pursuant to our implied consent law, WIS. STAT. § 343.305. His claim is that he was subjectively confused about whether he had a right to consult with an attorney before submitting to the test. He submits that because he exhibited this confusion to the officer, the officer had an affirmative duty to advise him that the right to counsel does not attach to the implied consent statute pursuant to ***State v. Reitter***, 227 Wis. 2d 213, 231, 595 N.W.2d 646 (1999). We reject his argument for two reasons: First, he did not exhibit confusion to the officer. Second, even if he had, ***Reitter*** cannot be read to impose any duty upon the officer. We affirm.

¶2 We start with ***Reitter***. This district of the court of appeals certified ***Reitter*** because of our concern that while many of our citizens are aware of the right to consult an attorney once arrested, the law does not allow a citizen arrested for driving while intoxicated to insist on consulting an attorney before deciding whether to submit to a blood alcohol test. We thought the supreme court should speak to the issue of whether the officer should inform an arrested driver that there is no right to counsel in the context of the implied consent law.

¶3 The supreme court granted certification and did speak to the issue. The court held:

> Inasmuch as the implied consent law is a statutory creation, it is the legislature, not this court, which should impose duties upon officers in the implied consent setting; and until the legislature modifies the implied consent statute, officers are under no affirmative duty to advise

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2003-04). All subsequent references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

> custodial defendants about rights for which the statute makes no provision. We observe that where a defendant expresses no confusion about his or her understanding of the statute, a defendant constructively refuses to take a breathalyzer test when he or she repeatedly requests to speak with an attorney in lieu of submitting to the test.

Id. at 217-18.

¶4 Curry seizes on the "where a defendant expresses no confusion" language to launch his attack. He argues that he was confused about whether he had a right to consult with an attorney and that, under this scenario, ***Reitter*** must be read to impose a duty on the officer to inform Curry that he had no right to counsel before taking the test.

¶5 There are two problems with Curry's argument. First, the record shows no confusion on Curry's part. Curry was arrested for operating a vehicle while intoxicated and was transported to the sheriff's office. In the sally port, the officer explained how the process works for taking a breathalyzer test. Curry responded that he had already submitted to a Preliminary Breath Test and that was the only test he was going to do without a lawyer. Subsequently, after the arresting officer read him the Informing the Accused form and asked Curry to submit to the test, he refused. Curry informed the officer that he was not going to perform the test without a lawyer or without speaking to a lawyer.[2]

¶6 Nothing in the facts at bar show Curry alerting the officer that he thought he had a constitutional right to an attorney before taking the test. Nor is there anything in the facts that shows how he expressed confusion about the lack

[2] Curry claims that the factual findings include his testimony that when told by the officer that he would be marked as a refusal, he replied to the officer, "I don't refuse to take it at all." But the trial court did not mention this statement in its factual determination, and we will not consider it. Even if we did, the statement would have no relevance to our holding.

of information concerning his right to counsel in the Informing the Accused form. In truth, the facts elicited here are not even as close as the facts in the ***Reitter*** case. There, after reading the Informing the Accused form, Reitter repeatedly stated that he wished to call an attorney. ***Id.*** at 220. The deputy in that case did not respond directly to Reitter's requests, but informed Reitter about the nature of the implied consent law and the consequences of refusal. ***Id.*** The supreme court concluded that "[t]he record does not suggest Reitter was confused by Deputy Sipher's reading of the 'Informing the Accused' Form." ***Id.*** at 221. The supreme court arrived at this conclusion even in the face of evidence that Reitter had vocalized how "his rights were [being] violated." ***Id.***

¶7 Here, by contrast, Curry never vocalized how he thought he had a "right" to an attorney. Moreover, Curry never even questioned the officer about his right to counsel after the Informing the Accused form was read to him. We hold that Curry has failed to distinguish his situation from Reitter's.

¶8 Second, even if Curry had expressed to the officer some confusion about whether he had a right to counsel, ***Reitter*** does not establish that the officer then has a corresponding duty to tell the arrested driver that there is no right to counsel prior to taking the blood alcohol test. The ***Reitter*** court point blank said that "our courts do not recognize 'subjective confusion' as a defense." ***Id.*** at 229. It cited ***County of Ozaukee v. Quelle***, 198 Wis. 2d 269, 280, 542 N.W.2d 196 (Ct. App. 1995), as authority for that proposition. ***Reitter***, 227 Wis. 2d at 229. The court explained that the officer's only duty under these circumstances is to administer the information contained in the Informing the Accused form. ***Id.*** at 230. This was done here.

¶9 True, the supreme court left the door open for the possibility of a situation where the evidence showed the arrested driver to be confused about the right to counsel vis-à-vis the Informing the Accused form. But the court tellingly hypothesized the circumstances under which this situation would occur. If an arrested driver were to have claimed to the officer that his or her insistence for a lawyer "fell under the shadow of ***Miranda*** warning, [Reitter] might have made an argument for obligating the [officer] to clarify any resulting right to counsel confusion. Instead, Reitter offers little that would tempt us toward embarking down the tangled ***O'Connell*** path."[3] ***Reitter***, 227 Wis. 2d at 230. Like Reitter before him, Curry offers nothing that would likewise tempt this court toward taking the road he wants us to pursue.

By the Court.—Order affirmed.

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

[3] Case references in the quoted portion are to ***Miranda v. Arizona***, 384 U.S. 436 (1966), and ***Commonwealth v. O'Connell***, 555 A.2d 873 (Pa. 1989).