# 235 REFUSAL OF DEFENDANT TO FURNISH SAMPLE FOR ALCOHOL TEST

Testimony has been received that the defendant refused to furnish a (breath) (blood) (urine) sample for chemical analysis. You should consider this evidence along with all the other evidence in the case, giving to it the weight you believe it is entitled to receive.

**COMMENT**

Wis JI-Criminal 235 was originally published in 1962. The comment was updated in 1982, 1983, 1985, 2004 and 2021. Nonsubstantive editorial changes were made in 1992 and 2000. This revision was approved by the Committee in February 2021; it restored the reference to "blood" in the text and added to the Comment.

The 2018 revision removed reference to a blood test in light of decisions from the United States and Wisconsin Supreme Courts. In Birchfield v. North Dakota, 579 U.S. ___, 136 S.Ct. 2160 (2016), the court held that it is unconstitutional to make it a crime to refuse a warrantless blood test after being lawfully arrested for OWI – where exigent circumstances were not shown. However, the court also stated:

> "Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply. Petitioners do not question the constitutionality of those laws and nothing we say here should be read to cast doubt on them." 136 S.Ct. 2160, 2185-86.

In State v. Dalton, 2018 WI 85, 383 Wis.2d 147, 914 N.W.2d 120, the defendant was subjected to a warrantless blood draw that was justified by exigent circumstances. The Wisconsin Supreme Court held that a trial court erred by expressly relying on the defendant's refusal to consent to the blood draw to increase his sentence within the allowed statutory range:

> Dalton was criminally punished for exercising his constitutional right. Established case law indicates that this is impermissible. ¶61.
>
> . . . the circuit court violated Birchfield by explicitly subjecting Dalton to a more severe criminal penalty because he refused to provide a blood sample absent a warrant. ¶67.

Neither Birchfield nor Dalton holds that commenting on a blood test refusal is improper, but in 2018, the Committee decided to remove reference to a blood test from the text of the instruction to avoid possible issues as the area of the law continued to develop. However, after the 2021 decision in State v. Levanduski, 2020 WI App 53, 393 Wis.2d 674, 948 N.W.2d 411, the Committee decided to restore the reference to a blood test.

In Levanduski, the court resolved an issue arguably left open by Birchfield by holding that when an officer reads Wisconsin's "Informing the Accused" form to an OWI suspect, and the suspect refuses a blood draw, the refusal can be used against him or her at trial. Specifically, § 343.305(3)(a) states that "upon

arrest for a violation of § 346.63(1) … a law enforcement officer may request the person to provide one or more samples of his or her blood, breath or urine." If an officer determines that a sample is necessary, he or she must read the "Informing the Accused" form provided in § 343.305(4), which states in part:

> "If you refuse to take any test that this agency requests, your operating privileges will be revoked and you will be subject to other penalties. The test results or the fact that you refused testing can be used against you in court." Wis. Stat. § 343.305(4).

The defendant in Levanduski claimed that using a person's refusal to submit to a warrantless search violates the Fourth Amendment. However, the court in Levanduski noted that numerous decisions have referred approvingly to the general concept of implied consent laws that impose civil penalties and evidentiary consequences. Relying primarily on Birchfield and Dalton, the court concluded that imposing civil penalties and evidentiary consequences for refusals are lawful under the Fourth Amendment as they are distinct from criminal penalties. Levanduski, 393 Wis.2d 674, ¶13. Therefore, the language provided in § 343.305(4) correctly states the law and the fact that a suspect refused testing can be used against him or her in court as a means of showing consciousness of guilt. Id., citing State v. Zielke, 137 Wis.2d 39, 49-50, 403 N.W.2d 427 (1987).

In State v. Albright, 98 Wis.2d 663, 298 N.W.2d 196 (Ct. App. 1980), the court of appeals reaffirmed that evidence of a defendant's refusal to take a chemical test was relevant and constitutionally admissible in a drunk driving prosecution. "A reasonable inference from refusal to take a mandatory breathalyzer test is consciousness of guilt. The person is confronted with a choice of the penalty for refusing a test, or taking a test which constitutes evidence of his sobriety or intoxication. Perhaps the most plausible reason for refusing the test is consciousness of guilt, especially in view of the option to taking an alternative test." 98 Wis.2d 663, 668-69. The evidence being relevant and there being no right to refuse to take a test, the court held there was no rationale for prohibiting comment on the refusal. See also South Dakota v. Neville, 459 U.S. 553, 556 103 S.Ct. 916 (1983).

In State v. Lemberger, 2017 WI 39, 369 Wis.2d 224, 880 N.W.2d 183, the Wisconsin Supreme Court rejected a claim that trial counsel provided ineffective assistance in failing to challenge the prosecutor's comment on Lemberger's refusal to take a breath test:

> Thus, the law was settled at the time of Lemberger's trial that, upon his lawful arrest for drunk driving, Lemberger had no constitutional or statutory right to refuse to take the breathalyzer test and that the state could comment at trial on Lemberger's improper refusal to take the test. ¶29.

The court also noted that the decision in Birchfield v. North Dakota, 579 U.S. ___, 136 S.Ct. 2160 (2016), confirmed that persons lawfully arrested for drunk driving have no right to refuse a breath test. ¶34.

The defendant's explanation for the refusal is also admissible. Since the relevance of the refusal is that it tends to indicate a consciousness of guilt,

> [t]he corollary of that rule is that any evidence that tends to rebut or diminish the force of that permissible inference is also relevant, for it tends to make less probable the fact of intoxication – a fact of consequence in this action, and, therefore, equally admissible. Thus, evidence that would tend to show that the refusal was for reasons unrelated to a consciousness of guilt or the fear that the test would reveal the intoxication, tends to abrogate, or at least diminish, the reasonableness of the inference to be drawn from an unexplained refusal to take the alcohol test.

State v. Bolstad, 124 Wis.2d 576, 585-86, 370 N.W.2d 576 (1985).

For a more complete discussion of the case law on this topic, see Wis JI-Criminal 2600 Introductory Comment at Sec. VII., F.