STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2014AP1870-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

DAVID W. HOWES,

Defendant-Respondent.

ON APPEAL FROM AN ORDER GRANTING A MOTION TO SUPPRESS EVIDENCE, AND AN ORDER DENYING A MOTION FOR RECONSIDERATION, BOTH ENTERED IN THE CIRCUIT COURT FOR DANE COUNTY, THE HONORABLE JOHN W. MARKSON, PRESIDING

REPLY BRIEF OF PLAINTIFF-APPELLANT

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ARGUMENT

THE CIRCUIT COURT ERRED IN CONCLUDING THAT THE "UNCONSCIOUS DRIVER" PROVISIONS IN THE IMPLIED CONSENT LAW ARE UNCONSTITUTIONAL, AND IN GRANTING HOWES' MOTION TO SUPPRESS EVIDENCE.

A. Introduction.

In its initial brief, the State explained that the circuit court erred in concluding that Wis. Stat. § 343.305(3)(ar) and (b), the "unconscious driver" provisions in Wisconsin's implied consent law, are unconstitutional. The State explained that under the implied consent law, a person who operates a motor vehicle on a Wisconsin highway has given consent to a test of his or her blood, breath or urine. Wis. Stat. § 343.305(2). When a law enforcement officer requests a sample of blood, breath or urine under § 343.305(3)(a) or (am), or requires a sample under § 343.305(3)(ar) or (b), the person can either submit, or withdraw the consent he or she has already given, and refuse. If the person submits, one or more samples may be taken and one or more tests may be administered. If the person refuses, thereby withdrawing consent, he or she faces revocation of his or her operating privilege.

The unconscious driver provisions at issue here simply provide that "[a] person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent under this subsection." Wis. Stat. § 343.305(3)(ar) and (b). These provisions are not unconstitutional because a

person who is tested under these provisions has consented to testing.

In concluding that § 343.305(3)(ar) and (b) are unconstitutional, the circuit court relied on this court's interpretation of the implied consent law in *State v. Padley*, 2014 WI App 65, 354 Wis. 2d 545, 849 N.W.2d 867 (31:4-6; A-Ap. 195-97).

In its initial brief, the State explained that *Padley* incorrectly concluded that the consent a person gives under the implied consent law does not authorize the taking of a sample for testing, and that "actual" consent is required at the time the officer requests or requires a sample (State's Br. at 25-31).

The State also explained that the circuit court relied on *Missouri v. McNeely*, 133 S. Ct. 1552 (2013), only for the proposition that a warrantless blood draw is constitutional only if it is administered under an exception to the warrant requirement, and that consent is such an exception (31:3; A-Ap. 194). (State's Br. at 33).

In his brief, Howes argues that the circuit court correctly found § 343.305(3)(ar) and (b) unconstitutional. He argues that "*McNeely* stands for the proposition that per se exceptions to the Fourth Amendment's warrant requirement are prohibited, that the 'unconscious driver' provisions of Wisconsin's implied consent laws operate as such a categorical exception, and that, therefore, the provisions under controversy here are unconstitutional" (Howes' Br. at 8).

However, *McNeely* does not govern this case. *McNeely* concerns exigency, not consent. It does

not prohibit categorical exceptions to the warrant requirement, and it does not limit the validity of consensual blood draws under the implied consent law.

The issue in this case concerns when a person gives consent to a blood draw. Under its plain language, the implied consent law provides that any person who operates a motor vehicle on a Wisconsin highway has consented to a blood draw. The "unconscious driver" provisions set forth a presumption that a person who is unconscious or otherwise incapable of withdrawing that consent has not withdrawn it. These provisions are not unconstitutional.

B. Under Wisconsin's implied consent law, any person who operates a motor vehicle on a highway in Wisconsin is deemed to have given consent to the taking of one or more samples of his or her blood, breath or urine for testing, when requested or required by a law enforcement officer.

Under the plain language of Wis. Stat. § 343.305(2), any person who operates a motor vehicle on a Wisconsin highway has given consent to a test of his or her blood, breath or urine when a law enforcement officer requests a sample. Wis. Stat. § 343.305(2).

In his brief, Howes argues, "Under Wisconsin law, 'implied consent' does not mean

the police enjoy *carte blanche* to physically force a blood draw" (Howes' Br. at 9).

But the State has not even suggested that officers have *carte blanche* to force a blood draw. A blood draw under the implied consent law is not forced. It is consensual.

Howes asserts that the State "interprets the notion of 'implied consent' as an invasive literal permission and/or absolute forfeiture of individual security and privacy rights" (Howes' Br. at 9).

The State maintains that the implied consent law means exactly what it says:

> Any person who . . . operates a motor vehicle upon the public highways of this state . . . 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 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) (ar) or (b). Any such tests shall be administered upon the request of a law enforcement officer.

Wis. Stat. § 343.305(2).

The law provides that a person who operates a motor vehicle on a Wisconsin highway has given consent to a blood draw. A person can withdraw that consent. But a person who is unconscious or otherwise unable to withdraw consent is presumed not to have withdrawn it. Nothing in the implied consent law authorizes a forced blood draw.

Howes points out that in *Padley*, 354 Wis. 2d 545, this court concluded that "actual" consent rather than "implied" consent is required to authorize a warrantless blood draw (Howes' Br. at 10).

In its initial brief, the State explained why *Padley*'s analysis of the implied consent law, and particularly the distinction it drew between actual and implied consent, is incorrect (State's Br. at 25-31). The State explained that the Wisconsin Supreme Court has long held that a blood draw under the implied consent law is authorized by the consent a person gives when he or she operates a motor vehicle on a Wisconsin highway (State's Br. at 14-21).

Howes argues that none of the cases the State cited are "necessarily inconsistent" with the conclusion in *Padley* that a blood draw must be authorized by actual consent rather than implied consent (Howes' Br. at 13 n.6). But he does not discuss any of the cases, or point to any case that reached the same conclusion that this court reached in *Padley*.

Howes points out that the State acknowledged that some decisions by the supreme court and this court refer to a person giving consent to a blood draw by obtaining a driver's license, while others refer to giving consent by operating a motor vehicle on a Wisconsin highway. He asserts that this "highlights the absurdity in the contention that implied consent and actual consent to a Fourth Amendment search are categorically interchangeable" (Howes' Br. at 13 n.6).

But Howes does not point to a single case other than *Padley* holding that consent under the implied consent law is given when the officer requests a sample for testing, or that actual consent rather than implied consent is required to authorize testing.

Howes points out a "contradiction" in the State's position, specifically that the State asserted that the consent in § 343.305(3)(ar) and (b) "cannot reasonably be read as referring to a different consent than that which applies in the rest of the implied consent law," but then does "just that by necessary implication" (Howes' Br. at 13 n.7). He seems to think that the State is arguing that "confirmatory consent" is necessary to authorize a blood draw from a conscious person, but implied consent is sufficient when a person is unconscious (Howes' Br. at 13 n.7).

However, the State's position is that the consent a person gives when he or she operates a motor vehicle on a Wisconsin highway authorizes a blood draw when requested or required by a law enforcement officer, whether the person is conscious or unconscious, unless that consent is withdrawn (State's Br. at 30).

Howes argues that the State incorrectly asserted that the circuit court's decision would exempt unconscious drivers from blood tests. He asserts that just like a conscious driver who refuses to submit to testing, an unconscious driver would face the same "exemption"—"the non-administration of the sought test in the absence of a warrant or exigent circumstances" (Howes' Br. at 14).

But the State's argument is that under the implied consent law, all persons who operate a motor vehicle on a Wisconsin highway have consented to giving a sample for testing when a law enforcement officer requests or requires it. A person who withdraws that consent faces revocation of the driving privilege. A person who is unconscious presumably cannot withdraw consent and refuse to submit, and therefore cannot be subject to refusal. Accordingly, the person is "exempt" from revocation for refusal (State's Br. at 13).

Howes refers to the State's "lamentation at its immediate inability to sanction an unconscious person for non-affirmative conduct" (Howes' Br. at 14 n.8).

But the State does not lament the inability to sanction an unconscious person. It simply pointed out that the implied consent law accounts for the inability of an unconscious person to withdraw consent by presuming that any person who is unconscious or otherwise unable to withdraw consent has not withdrawn consent, and therefore is not subject to revocation for refusal.

Howes argues that the circuit court's decision ensures that "the same constitutional safeguards are afforded irrespective of an individual's consciousness or lack thereof," and that "[i]f a conscious person has the constitutionally afforded right to require the State to procure a warrant or prove application of a valid exception to the warrant requirement, that same right ought to be afforded to an unconscious person" (Howes' Br. at 14 n. 8).

The State agrees that a person has the same rights whether conscious or unconscious. In either case, by operating a motor vehicle on a Wisconsin highway, the person has given consent to testing, and that consent authorizes a blood draw unless the person withdraws it.

Howes argues that "the State's position on consent is a fiction rendered obvious by the fact of law enforcement agencies' changes in policy and procedure in the wake of *McNeely*" (Howes' Br. at 15). He asserts that "If implied consent could suffice as actual consent (given at the time of licensure per the State's reasoning) then there would be no need for a law enforcement officer to ever apply for a warrant in order to initiate a blood draw" (Howes' Br. at 15).

Howes is wrong because a law enforcement officer will need to obtain a warrant to administer a blood draw if the person refuses to submit, and withdraws consent. And the State's position is that, as stated in Wis. Stat. § 343.305(2), a person gives consent by operating on a highway in Wisconsin (State's Br. at 17).

Howes argues that if the State's position is correct, "reading the 'Informing the Accused' form would seemingly be rendered superfluous," because the person has already given consent (Howes' Br. at 15).

But the legislature has required officers to read the informing the accused form to persons who have already given consent, because consent is not submission. The officer informs the person that he or she can submit to testing, or refuse and withdraw the consent already given, and face sanctions. Wis. Stat. § 343.305(4).

Howes argues that the State's position is that "despite the explicit, contradictory commentary in the very recent *Padley* decision—'implied consent' authorizes warrantless blood draws in unconscious persons" (Howes' Br. at 16).

However, in *Padley* this court recognized that the implied consent law authorizes blood draws from unconscious persons. *Padley* noted the "language in the implied consent law as amended by 2009 Wisconsin Act 163, which establishes that, at least in the context of incapacitated drivers, 'implied consent' is a sufficient basis on which to proceed with a warrantless search." *Padley*, 354 Wis. 2d 545, ¶ 39 n.10. This court added that "at least in the context of an incapacitated driver and in the limited context of § 343.305(3)(ar)2., implied consent is deemed the functional equivalent of actual consent." *Id.* The issue here is not whether the implied consent law authorizes blood draws from unconscious persons. It is whether by doing so, the statute is unconstitutional.

C. The "unconscious driver" provisions in Wisconsin's implied consent law do not violate the Fourth Amendment or *McNeely*.

Howes argues that in its initial brief, the State did not "meaningfully" address the holding in *McNeely*, or "acknowledge its significance with respect to the Circuit Court's holding in this case" (Howes' Br. at 16). He asserts that *McNeely*'s "underlying logic and reasoning seem resoundingly clear: per se exceptions to the warrant requirement are not permissible" (Howes' Br. at 16). He argues that the

"unconscious driver" provisions in Wisconsin's implied consent law are categorical exceptions and therefore impermissible (Howes' Br. at 17).

The State did not address *McNeely* at length in its initial brief because nothing in *McNeely* renders § 343.305(3)(ar) and (b) unconstitutional, and because the circuit court did not conclude that those provisions are unconstitutional under *McNeely*.

In *McNeely*, the defendant refused to submit to a blood draw, but a blood sample was taken from him. *McNeely*, 133 S. Ct. at 1557. Implied consent was not at issue in *McNeely*. The issue was whether the nonconsensual warrantless blood draw was constitutional. *Id.* at 1556. The Supreme Court stated that: "The question presented here is whether the natural metabolization of alcohol in the bloodstream presents a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases." *McNeely*, 133 S. Ct. at 1556.

Here, Howes impliedly gave consent to a blood draw, never withdrew it, and submitted to the officer's request for a blood draw. The blood draw was warrantless, but consensual. *McNeely* simply does not apply.

The circuit court explained in its decision denying reconsideration that it relied on *McNeely* only for the proposition that a warrantless blood draw is constitutional only if it is administered under an exception to the warrant requirement, and that consent is such an exception (31:3; A-Ap. 194).

Contrary to Howes' assertion, *McNeely* did not hold that "per se exceptions to the warrant requirement are prohibited under the Fourth Amendment" (Howes' Br. at 18). The Court made clear that exigency is a per se exception to the warrant requirement. *McNeely*, 133 S. Ct. at 1558. The Court noted that it had "recognized a limited class of traditional exceptions to the warrant requirement that apply categorically and thus do not require an assessment of whether the policy justifications underlying the exception, which may include exigency-based considerations, are implicated in a particular case," including the automobile exception and searches incident to arrest. *McNeely*, 133 S. Ct. at 1559 n.3 (citations omitted). The issue in *McNeely* was whether the dissipation of alcohol is another per se exigency. *Id.* at 1556.

Like exigency, consent is a per se exception to the warrant requirement. *Padley*, 354 Wis. 2d 545, ¶ 23 (citing *State v. Williams*, 2002 WI 94, ¶ 18, 255 Wis. 2d 1, 646 N.W.2d 834).

McNeely did not hold that consent is not a valid exception to the warrant requirement. The issue in *McNeely* explicitly concerned nonconsensual blood draws. The Court addressed consensual blood draws only in stating that blood draws under implied consent laws are one of "a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws." *McNeely*, 133 S. Ct. at 1566.

Howes argues that "[i]f the *McNeely* court considered implied consent a valid per se exception to the warrant requirement, there would have been no need to draft the opinion in the first

place—the Court could have just relied on Missouri's analogous 'implied consent' involved in that case" (Howes' Br. at 18 (citing *McNeely*, 133 S. Ct. at 1557)).

But the defendant in *McNeely* withdrew his consent and refused chemical testing. *McNeely*, 133 S. Ct. at 1557. The issue was not whether the blood sample was validly obtained under the implied consent law. It was whether the blood sample was validly obtained after the defendant withdrew his consent.

Howes argues that "the 'unconscious driver' provisions constitute the functional equivalent of the categorical rule that dissipation of alcohol comprises an exigent circumstance" (Howes' Br. at 17). He argues that Wisconsin's implied consent laws are "directly premised upon the purported exigency created by alcohol dissipation – apparent in the fact that the statutes create the presumption of consent where a law enforcement officer 'detects any presence' of alcohol or another controlled substance– which is precisely the fallacious conception of exigence that was expressly repudiated by *McNeely*" (Howes' Br. at 19-20). Howes asks, "If the dissipation of alcohol in a conscious person does not present a per se exigency for purposes of an exception to the warrant requirement, how can the mere detection of 'any presence' of alcohol in an unconscious person be construed to present one?" (Howes' Br. at 20).

However, implied consent is not premised on exigent circumstances, but on an entirely separate exception to the warrant requirement—consent. Any person who operates a motor vehicle on a Wisconsin highway is deemed to have given

consent to testing when requested or required by a law enforcement officer. The unconscious driver provision merely states that a person who is unconscious or otherwise incapable of withdrawing that consent has not withdrawn it. The unconscious driver provisions have nothing to do with exigency, and they are not unconstitutional.

CONCLUSION

For the reasons explained above, the State respectfully requests that this court reverse the circuit court's order granting the motion to suppress evidence and finding part of Wisconsin's implied consent law unconstitutional.

Dated this 16th day of February, 2015

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,000 words.

Dated this 16th day of February, 2015.

_____

Michael C. Sanders
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 16th day of February, 2015.

_____
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