STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2015AP450-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

ADAM M. BLACKMAN,

Defendant-Respondent.

ON APPEAL FROM A DECISION AND ORDER GRANTING A MOTION TO SUPPRESS EVIDENCE, ENTERED IN THE CIRCUIT COURT FOR FOND DU LAC COUNTY, THE HONORABLE GARY SHARPE, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

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ISSUE PRESENTED

Wisconsin Stat. § 343.305(3)(ar)2., part of the implied consent law, authorizes law enforcement officers to request a blood sample from a driver who is involved in an accident that causes death or great bodily harm if the officer has reason to believe the driver violated a traffic law. Adam M. Blackman consented to a blood draw under this provision

after an officer informed him that if he refused, his operating privilege would be revoked. Did the circuit court properly suppress the blood test results because it concluded that a revocation for refusal would have been unenforceable, so Blackman's consent was coerced?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The plaintiff-appellant, State of Wisconsin (State), does not request oral argument, because the briefs should adequately address the issues in this case. The State believes that publication will likely be warranted because this case is an opportunity for the court to interpret and clarify Wisconsin's Implied Consent Law, Wis. Stat. § 343.305.

STATEMENT OF THE CASE

The State appeals a decision and order granting a motion to suppress evidence (23; R-Ap. 101-05). Blackman was charged with reckless driving causing great bodily harm, injury by intoxicated use of a vehicle, injury by use of a vehicle with a prohibited alcohol concentration, operating a motor vehicle while under the influence of an intoxicant (OWI), and operating a motor vehicle with a prohibited alcohol concentration (PAC) (13). Blackman moved to suppress the results of a test of his blood (19; R-Ap. 106-18). The circuit court, the Honorable Gary Sharpe, granted the motion, concluding that Blackman's consent to a blood draw under the implied consent law was coerced (23:5; R-Ap. 105). The State now appeals the circuit court's order granting the suppression motion (25).

STATEMENT OF FACTS

Blackman was involved in a traffic accident on June 22, 2013 (1:1). A car that he was driving collided with a bicycle ridden by S.R.K. (1:1). Fond Du Lac County Sheriff's Deputy John Abler arrived to the scene and spoke to witnesses including Blackman (35:5-7). A witness told

Deputy Abler that the bicycle had hit Blackman's car, and the rider was thrown over the car (35:7). The bicyclist suffered extremely serious injuries, "including a mandibular fracture, fractures to both forearms, rib fracture, sinus fracture, a C6 vertebrae fracture, liver laceration," as well as "a lung contusion, [and] a subdural hemorrhaging brain bleed" (35:24).

Deputy Abler testified that he believed that Blackman violated a traffic law by turning left without yielding to oncoming traffic (36:5-6; R-Ap. 122-23). Deputy Abler also testified that he did not initially have reason to believe that Blackman was under the influence of intoxicants (36:6; R-Ap. 123).

Deputy Abler requested that Blackman consent to a blood draw under the implied consent law (36:7-8; R-Ap. 124-25). He read the Informing the Accused form to Blackman, and Blackman agreed to a blood draw (36:7-9; R-Ap. 124-26). A test revealed a blood alcohol concentration of .10 (35:8).[1]

Blackman was charged with reckless driving causing great bodily harm, injury by intoxicated use of a vehicle, injury by use of a vehicle with a prohibited alcohol concentration, and OWI and PAC, both as first offenses (13). He moved to suppress the results of the test of his blood on three grounds (19; R-Ap. 106-18). Blackman argued that he was coerced into providing a blood sample because Deputy Abler invoked the implied consent law when he requested a blood sample under Wis. Stat. § 343.305(3)(ar), but the implied consent law only applies under § 343.305(3)(ar) when a person is required to give a sample (19:2-4; R-Ap. 107-09). Blackman also argued that Deputy Abler misinformed him that he faced revocation of his operating privilege if he refused chemical testing, but he really faced

[1] Deputy Abler testified that the blood test result was .10 (35:8). The criminal complaint indicates that the result was .104 (1:2).

only arrest under § 343.305(3)(a), not revocation (19:4-8; R-Ap. 109-13). Blackman also argued that if the implied consent law applied to him, and if his consent was valid, § 343.305(3)(ar) is unconstitutional, both facially and as applied to him, because it provides for a blood draw without probable cause to arrest (19:8-13; R-Ap. 113-18).

After a hearing (36; R-Ap. 119-34), the circuit court rejected the first two arguments Blackman made in his motion. The court concluded that § 343.305(3)(ar) is "part of and governed by the implied consent law" (23:2; R-Ap. 102). The court agreed that an officer is not authorized to issue a notice of intent to revoke when a person refuses to submit to a request for a sample under § 343.305(3)(ar), but it noted that the officer can arrest the person and then request a sample under § 343.305(3)(a), and if the person refuses, the officer can issue a notice of intent to revoke (23:3; R-Ap. 103). Therefore, informing Blackman that his operating privilege would be revoked was not misleading "because the potential for revocation was ultimately available through section (3)(a) if the refusal continued" (23:3; R-Ap. 103). The court did not address Blackman's argument that § 343.305(3)(ar) is unconstitutional.

The circuit court granted Blackman's motion to suppress on a different ground, concluding that Blackman's consent to a blood draw was coerced because he was told that if he refused, his operating privilege would be revoked (23:4-5; R-Ap. 104-05). The court concluded that a revocation for a refusal under § 343.305(3)(ar) would be "statutorily unenforceable" and the circuit court would be required to reverse it (23:4-5; R-Ap. 104-05).

The circuit court relied on *State v. Padley*, 2014 WI App 65, ¶ 66 n.12, 354 Wis. 2d 545, 849 N.W.2d 867, in which this court recognized "an apparent disconnect between the terms of Wis. Stat. § 343.305(3)(ar)2. and the statutes governing refusal hearings," § 343.305(9)(a)5. This court noted that under § 343.305(3)(ar)2., an officer can request a

sample when there is an accident involving death or great bodily harm when the officer believes the driver violated a traffic law, but the issues include whether the officer had probable cause to arrest for an OWI-related offense, and whether the person was arrested for an OWI-related offense. *Padley*, 354 Wis. 2d 545, ¶ 66 n.12.

Because the circuit court concluded that Blackman's consent to a blood draw was coerced, it granted his motion to suppress the blood test results (23:4-5; R-Ap. 104-05). The State now appeals the circuit court's order granting the motion to suppress evidence.

ARGUMENT

THE CIRCUIT COURT INCORRECTLY GRANTED BLACKMAN'S MOTION TO SUPPRESS EVIDENCE BECAUSE IT INCORRECTLY CONCLUDED THAT HIS CONSENT TO A BLOOD DRAW WAS COERCED.

A. Standard of review.

"'Whether evidence should be suppressed is a question of constitutional fact.'" *State v. Johnson*, 2007 WI 32, ¶ 13, 299 Wis. 2d 675, 729 N.W.2d 182 (quoting *State v. Knapp*, 2005 WI 127, ¶ 19, 285 Wis. 2d 86, 700 N.W.2d 899). Constitutional facts consist of "the circuit court's findings of historical fact, and its application of these historical facts to constitutional principles." *Id.*, citing *State v. Turner*, 136 Wis. 2d 333, 343-44, 401 N.W.2d 827 (1987). The circuit court's findings of historical fact are reviewed under the clearly erroneous standard. *Id.* The court's application of constitutional principles to those historical facts is reviewed de novo. *Id.*

B. Introduction.

The circuit court granted Blackman's motion to suppress his blood test results on the ground that his consent to a blood draw was coerced because police told him

that if he refused, his operating privilege would be revoked. The court concluded that a revocation for a refusal under Wis. Stat. § 343.305(3)(ar) would be "statutorily unenforceable" under Wis. Stat. § 343.305(9)(a)5. (23:4-5; R-Ap. 104-05).

As the State will explain, the circuit court's conclusion was incorrect, because a revocation for a refusal under § 343.305(3)(ar) is statutorily enforceable, and Blackman was properly informed of the consequences of refusing and was not coerced into consenting. Deputy Abler correctly informed Blackman that if he refused, his operating privilege would be revoked. When any person refuses, revocation is automatic, unless the person both timely requests a refusal hearing, and prevails at the hearing. *Village of Elm Grove v. Brefka*, 2013 WI 54, ¶ 39, 348 Wis. 2d 282, 832 N.W.2d 121. This is true whether the person initially refuses under § 343.305(3)(a), or refuses under § 343.305(3)(ar) and then under § 343.305(3)(a).

A person's submission to a request for a blood sample under § 343.305(3)(a) is not coerced when the officer does not inform the person that a revocation for refusal will be rescinded if the person timely requests a refusal hearing, and prevails at the hearing. The same is true of a person's consent to a blood draw under § 343.305(3)(ar). That consent is not coerced simply because the officer does not inform the person that a revocation for refusal will be rescinded if the person timely requests a refusal hearing, and prevails at the hearing.

As the State will also explain, an interpretation of § 343.305(9) as providing that probable cause and arrest for an OWI-related offense are always issues at refusal hearings, even when the person initially refused under § 343.305(3)(ar), would be contrary to the intent of the legislature. Instead, the language in § 343.305(9)(a)5. can be interpreted as providing that whether there was probable cause to arrest, and an actual arrest for an OWI-related

offense, are only issues when the person is arrested for an OWI-related offense, not when the person refuses under § 343.305(3)(ar) and is not arrested for an OWI-related offense.

C. Blackman's consent was not coerced because there was no police misconduct, undue pressure, or duress.

The circuit court granted Blackman's motion to suppress evidence because it concluded that his consent to a blood draw was coerced (23:4-5; R-Ap. 104-05). However, the court did not find that Deputy Abler engaged in any improper police conduct, and there is no evidence that Deputy Abler did anything improper to overcome Blackman's resistance. Deputy Abler merely read the Informing the Accused form to Blackman, as the court recognized he was required to do under the implied consent law (23:3; R-Ap. 103).

It is well established that the implied consent law is not unreasonably coercive. As this court has recognized, "at whatever point the motorist is coerced into making a decision, be it at the time the person applies for and obtains a license, or when the person begins operating the vehicle on each particular occasion, or after arrest, the statute's coerciveness is not unreasonable." *State v. Wintlend*, 2002 WI App 314, ¶ 18, 258 Wis. 2d 875, 655 N.W.2d 745.[2]

The State maintains that the issue is not whether Blackman was coerced into consenting to, or submitting to a blood draw, but whether his consent was voluntary. "In

[2] In *State v. Wintlend*, 2002 WI App 314, ¶¶ 12-16, 258 Wis. 2d 875, 655 N.W.2d 745, this court recognized that a person gives consent to the taking of a sample for testing under the implied consent law when he or she receives a Wisconsin drivers license, or when he or she operates a motor vehicle on a Wisconsin Highway. In *State v. Padley*, 2012 WI App 65, ¶¶ 25-27, 354 Wis. 2d 545, 849 N.W.2d 867, this court reached a different result, concluding that a person gives consent to the taking of a sample at the time the officer requests the sample.

order for consent to constitute a valid exception to the warrant requirement of the Fourth Amendment, it must be freely and voluntarily given." *Padley*, 354 Wis. 2d 545, ¶ 62 (citing *Bumper v. North Carolina*, 391 U.S. 543, 548-49 (1968); *State v. Phillips*, 218 Wis. 2d 180, 196, 577 N.W.2d 794 (1998) (additional citation omitted)). "Consent is voluntary if it is given in the 'absence of actual coercive, improper police practices designed to overcome the resistance of a defendant.'" *Id.* (quoting *State v. Clappes*, 136 Wis. 2d 222, 245, 401 N.W.2d 759 (1987)). "Where police engage in 'no actual coercion or improper police conduct,' consent is voluntary." *Id.* (quoting *Village of Little Chute v. Walitalo*, 2002 WI App 211, ¶ 11, 256 Wis. 2d 1032, 650 N.W.2d 891).

The circuit court concluded that Blackman's consent was coerced, or more aptly, involuntary, because the officer misinformed him by telling him that if he refused to submit to a blood draw, his operating privilege would be revoked. The court concluded that this information was misleading, because a revocation for refusal would have been statutorily unenforceable.

As the State will explain, the circuit court was incorrect. A revocation would have been enforceable unless Blackman both timely requested a refusal hearing, and then prevailed at that hearing. Blackman's consent to a blood draw was neither coerced nor involuntary.

D. Deputy Abler properly informed Blackman that if he refused a request for a blood sample, his operating privilege would be revoked.

When an officer properly informs a person of the potential consequences under the implied consent law, and does not engage in deceit or trickery, the person's consent is neither involuntary nor coerced. *Padley*, 354 Wis. 2d 545, ¶ 72 (citing *Walitalo*, 256 Wis. 2d 1032, ¶ 11).

Deputy Abler requested a blood sample from Blackman under Wis. Stat. § 343.305(3)(ar)2., which provides that an officer may request a sample of a person's blood, breath, or urine if the person is the operator of a vehicle that is involved in an accident that causes death or great bodily harm to any person, and the officer has reason to believe the person violated a state or local traffic law.[3] Deputy Abler testified that he believed Blackman had violated a traffic law by turning left without yielding to oncoming traffic (36:6; R-Ap. 123). Deputy Ryan Waldschimdt testified that the person whose bicycle collided with the vehicle operated by Blackman suffered serious injuries (35:24).[4]

Deputy Abler read the Informing the Accused form to Blackman, as required by Wis. Stat. § 343.305(4) (36:7-8;

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[3] Wisconsin Stat. § 343.305(3)(ar)2. provides as follows:

> 2. If a person is the operator of a vehicle that is involved in an accident that causes the death of or great bodily harm to any person and the law enforcement officer has reason to believe that the person violated any state or local traffic law, the officer may request the operator to provide one or more samples of his or her breath, blood, or urine for the purpose specified under sub. (2). Compliance with a request for one type of sample does not bar a subsequent request for a different type of sample. A person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent under this subdivision and one or more samples specified in par. (a) or (am) may be administered to the person. If a person refuses to take a test under this subdivision, he or she may be arrested under par. (a).

[4] At the suppression hearing, the parties stipulated that the bicyclist suffered great bodily harm (36:15).

R-Ap. 124-25).[5] Blackman then consented to a blood draw (36:8; R-Ap. 125).

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[5] Wisconsin Stat. § 343.305(4) provides as follows:

(4) INFORMATION. At the time that a chemical test specimen is requested under sub. (3) (a), (am), or (ar), the law enforcement officer shall read the following to the person from whom the test specimen is requested:

"You have either been arrested for an offense that involves driving or operating a motor vehicle while under the influence of alcohol or drugs, or both, or you are the operator of a vehicle that was involved in an accident that caused the death of, great bodily harm to, or substantial bodily harm to a person, or you are suspected of driving or being on duty time with respect to a commercial motor vehicle after consuming an intoxicating beverage.

This law enforcement agency now wants to test one or more samples of your breath, blood or urine to determine the concentration of alcohol or drugs in your system. If any test shows more alcohol in your system than the law permits while driving, your operating privilege will be suspended. If you refuse to take any test that this agency requests, your operating privilege 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.

If you take all the requested tests, you may choose to take further tests. You may take the alternative test that this law enforcement agency provides free of charge. You also may have a test conducted by a qualified person of your choice at your expense. You, however, will have to make your own arrangements for that test.

If you have a commercial driver license or were operating a commercial motor vehicle, other consequences may result from positive test results or from refusing testing, such as being placed out of service or disqualified."

When an officer requests a sample of blood, breath, or urine under § 343.305(3)(ar)1., and the person refuses, the officer cannot issue a notice of intent to revoke the person's operating privilege. Instead, the officer is authorized to arrest the person under § 343.305(3)(a), and the officer can then request a sample under § 343.305(3)(a). If the person refuses that request, the officer is required to issue a notice of intent to revoke the person's operating privilege. Wis. Stat. § 343.305(9)(a).

The notice of intent to revoke informs a person that: (1) before the request under § 343.305(3)(a), the person was either arrested for an OWI-related offense, or the officer had requested a sample under § 343.305(3)(ar); (2) the officer read the Informing the Accused form to the person; (3) the person refused; and (4) the person may request a hearing within ten days. Wis. Stat. § 343.305(9)(a)4.

The notice of intent to revoke also informs the person of the possible issues at a refusal hearing, stating:

> **5.** That the issues of the hearing are limited to:
>
> **a.** Whether the officer had probable cause to believe the person was driving or operating a motor vehicle while under the influence of alcohol, a controlled substance or a controlled substance analog or any combination of alcohol, a controlled substance and a controlled substance analog, under the influence of any other drug to a degree which renders the person incapable of safely driving, or under the combined influence of alcohol and any other drug to a degree which renders the person incapable of safely driving, having a restricted controlled substance in his or her blood, or having a prohibited alcohol concentration or, if the person was driving or operating a commercial motor vehicle, an alcohol concentration of 0.04 or more and whether the person was lawfully placed under arrest for violation of s. 346.63 (1), (2m) or (5) or a local ordinance in conformity therewith or s. 346.63 (2) or (6), 940.09 (1) or 940.25.

> **b.** Whether the officer complied with sub. (4).
>
> **c.** Whether the person refused to permit the test. The 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.

Wis. Stat. § 343.305(9)(a)5.

The officer is required under Wis. Stat. § 343.305(9)(a) to inform the circuit court of a refusal under § 343.305(3)(a). The court is then required to hold a hearing on the refusal, if the defendant requests a hearing within ten days. Wis. Stat. § 343.305(9)(c). If the person does not request a refusal hearing within ten days, the person's operating privilege is revoked. As this court has recognized:

> Wisconsin Stat. §§ 343.305(9)(a)4. and (10)(a) impose a mandatory requirement that the refusal hearing must be requested within ten days of service of the Notice of Intent. The penalty for a refusal followed by a failure to request a refusal hearing within ten days is also mandatory in requiring that "[i]f no hearing was requested, the revocation period shall begin 30 days after the date of the refusal." Id. at (10)(a).

Village of Elm Grove v. Brefka, 2013 WI 54, ¶ 39, 348 Wis. 2d 282, 832 N.W.2d 121.

As this court noted in *Padley*, 354 Wis. 2d 545, ¶ 31, under § 343.305(9), "[r]evocation of the license is automatic, in the sense that revocation may be overturned only if the driver prevails before a court at a refusal hearing requested by the driver within ten days of receipt of the notice of intent to revoke his or her license."

Although the officer in this case properly read the Informing the Accused form to Blackman, and properly informed him that if he refused a blood draw his operating

privilege would be revoked, the circuit court concluded that Blackman's consent was coerced because a revocation would be "statutorily unenforceable" (23:4; R-Ap. 104). The court's conclusion was based on a footnote in *Padley*.

In *Padley*, this court recognized "an apparent disconnect between the terms of Wis. Stat. § 343.305(3)(ar)2. and the statutes governing refusal hearings." In *Padley*, a law enforcement officer requested a sample under § 343.305(3)(ar)2., the same statute at issue in this case, from a driver who was involved in an accident and whom the officer believed had violated a traffic law. *Padley*, 354 Wis. 2d 545, ¶¶ 9-10. Like in this case, the officer read the Informing the Accused form to Padley, who consented to a blood draw. *Id.* ¶¶ 10-11.

In *Padley*, this court noted that:

> If Padley had refused to give her consent and timely sought a refusal hearing, the issues she could have raised at the hearing are limited and include: (1) "[w]hether the officer had probable cause to believe the [driver] was driving or operating a motor vehicle while under the influence of alcohol, [or] a controlled substance . . . ."; and (2) whether the driver was "lawfully placed under arrest" for an OWI-related violation. Sec. 343.305(9)(a)5.a. As should be clear from discussion above, a court at Padley's hypothetical refusal hearing could not have concluded that either of these two circumstances existed here.

Id. ¶ 66 n. 12.

This court did not address this "apparent disconnect" because Padley did not raise the argument in the circuit court or on appeal, and because the court believed that the "disconnect" was due to a drafting error and "does not contribute to any argument made by Padley." *Id.*

In the current case, the circuit court concluded that as a result of this "apparent disconnect," Blackman's consent to a blood draw was coerced. The court stated that "[t]he issue becomes whether Mr. Blackman was mislead or coerced by

the 'Informing the Accused' language under a scenario where any revocation described therein would be reversed" (23:4; R-Ap. 104). The court concluded that the language at issue was misleading and coercive, stating:

> Clearly a motorist like Mr. Blackman would have had his revocation reversed had he refused a test and been revoked because there was no probable cause to believe impairment existed under Section 343.305(9)(a)5.(a) at the time of driving. If his revocation was statutorily unenforceable at the time he was read the Informing the Accused and threatened with just such a revocation, how could he not be improperly coerced into consenting to a test.

(23:4; R-Ap. 104.)

The State maintains that even if the court correctly interpreted § 343.305(9)(a)5.a., the court incorrectly concluded that a revocation for refusing under § 343.305(3)(a) after refusing under § 343.305(3)(ar), and then being arrested, is statutorily unenforceable.

When a notice of intent to revoke is issued under the implied consent law, a person's operating privilege is revoked unless the person does two things: (1) request a refusal hearing; and (2) prevail at the hearing. As this court observed in *Padley*, 354 Wis. 2d 545, ¶ 31, "[r]evocation of the license is automatic, in the sense that revocation may be overturned only if the driver prevails before a court at a refusal hearing requested by the driver within ten days of receipt of the notice of intent to revoke his or her license."

The circuit court focused on what occurs if the person requests a refusal hearing within ten days. But it did not address the requirement that the person request a hearing within ten days. As the supreme court recognized in *Brefka*, 2013 WI 54, ¶ 40, if a person refuses and does not request a hearing within ten days, the person's operating privilege is revoked. The revocation is mandatory, whether the person

refused under § 343.305(3)(a), or the person refused under § 343.305(3)(ar), and then after being arrested, refused again under § 343.305(3)(a). Wis. Stat. § 343.305(9)(a)4.

Just like a person who initially refuses under § 343.305(3)(a), a person who refuses under § 343.305(3)(ar), who is then arrested, and who then refuses under § 343.305(3)(a) will have his or her operating privilege revoked unless he or she requests a hearing within ten days.

The State acknowledges that an officer does not inform a person that he or she has an opportunity to request a hearing within ten days until after the person submits to a request for a sample, or refuses. But that is the same whether the person initially refuses under § 343.305(3)(a), or whether the person refuses under § 343.305(3)(ar), is then arrested, and then refuses under § 343.305(3)(a). In both situations the officer informs the person of the right to request a hearing only after a refusal, when the officer issues the notice of intent to revoke. The information Deputy Abler gave Blackman—that if he refused a blood draw his operating privilege would be revoked—was the same information that an officer would give to a person who initially refuses under § 343.305(3)(a). The information was correct, and was not statutorily unenforceable.

E. Even if a person who refuses a request under Wis. Stat. § 343.305(3)(ar) and then under Wis. Stat. § 343.305(3)(a) timely requests a refusal hearing, a revocation of the person's operating privilege may be enforceable.

As explained above, a revocation for refusal under § 343.305(3)(ar), and then under § 343.305(3)(a), would not be unenforceable, but would instead be automatic unless the person timely requested a refusal hearing. The State maintains that under a number of scenarios, a revocation would not necessarily be unenforceable even if the person were to timely request a refusal hearing under the circuit court's interpretation of Wis. Stat. § 343.305(9)(a).

The circuit court relied on this court's description of the "apparent disconnect between the terms of Wis. Stat. § 343.305(3)(ar)2. and the statutes governing refusal hearings" in *Padley*. In *Padley*, this court concluded that "a court at Padley's hypothetical refusal hearing could not have concluded" that the officer had probable cause to arrest Padley for an OWI-related offense, and that Padley was lawfully placed under arrest for an OWI-related offense. *Padley*, 354 Wis. 2d 545, ¶ 66 n. 12.

The circuit court seemed to conclude that due to the "apparent disconnect," a revocation for a refusal under § 343.305(3)(ar), an arrest, and a refusal under § 343.305(3)(a), would never be enforceable because at a refusal hearing the person would always be able to show that the officer did not have probable cause to arrest for an OWI–related offense, and did not lawfully place the person under arrest for an OWI-related offense (23:3-5; R-Ap. 103-05).

The State maintains that this conclusion is incorrect. In a case in which a law enforcement officer believes a driver has been involved in an accident resulting in great bodily harm or death, and has reason to believe that the person has violated a traffic law, the officer may also have probable cause to believe that the person committed an OWI-related offense. The officer may proceed under either § 343.305(3)(a) or § 343.305(3)(ar). The officer could request a sample under § 343.305(3)(ar), and after a refusal, arrest the person for OWI or PAC or some other OWI-related offense, and then request a sample under § 343.305(3)(a). Under that scenario, the person would not necessarily prevail at a refusal hearing.

In a case in which an officer does not initially have probable cause to arrest for an OWI-related offense under § 343.305(3)(a), and therefore proceeds under § 343.305(3)(ar), nothing in the implied law precludes the officer from considering the person's refusal under

§343.305(3)(ar) in deciding whether to arrest the person for an OWI-related offense under § 343.305(3)(a). Refusal to submit to a test is powerful evidence that a person is under the influence of an intoxicant, or has a prohibited alcohol concentration or a detectable amount of a restricted controlled substance in his or her blood. A refusal carries sanctions. A person from whom a sample is requested is told that if he or she refuses, sanctions include revocation and the use of the refusal in court proceedings. In addition, an improper refusal counts as a prior conviction to enhance the sentence for subsequent offenses. After considering the refusal, an officer may well have probable cause to arrest the person for an OWI-related offense.

After a person refuses a request under § 343.305(3)(ar), the officer might learn that the person has three or more prior offenses, and is subject to the 0.02 standard. In such a case, a serious accident, a violation of a traffic law, and a refusal under § 343.305(3)(ar)2., might be sufficient to give the officer probable cause to arrest for an OWI-related offense.

Even if a refusal under § 343.305(3)(ar) along with the officer's other observations might not be sufficient for probable cause to arrest for an OWI-related offense, the officer might have probable cause to administer a preliminary breath test (PBT), or field sobriety tests. The purpose of field sobriety tests and the PBT is to determine if there is probable cause to arrest for an OWI-related offense. "The legislature entitled Wis. Stat. § 343.303 'Preliminary breath screening test,' and the text of the statute also describes the test as a 'preliminary breath screening test.'" *Cnty. of Jefferson v. Renz*, 231 Wis. 2d 293, 313, 603 N.W.2d 541 (1999).

To request a PBT, an officer needs probable cause that is "greater than the reasonable suspicion necessary to justify an investigative stop," but "less than the level of proof required to establish probable cause for arrest." *State v.*

Goss, 2011 WI 104, ¶ 25, 338 Wis. 2d 72, 806 N.W.2d 918 (quoting *Renz*, 231 Wis. at 300-01).

The results of a PBT and field tests may give the officer probable cause to arrest for an OWI-related offense. Alternatively, refusal to perform field tests can be considered in determining whether there is probable cause to arrest. *State v. Schmidt*, 2012 WI App 137, ¶ 8, 345 Wis. 2d 326, 825 N.W.2d 521 (citing *State v. Babbitt*, 188 Wis. 2d 349, 362–63, 525 N.W.2d 102 (Ct.App.1994)).

In any of these situations, an officer could have probable cause to arrest for an OWI-related offense after a refusal under § 343.305(3)(ar). A revocation would therefore be statutorily enforceable even if the person timely requests a refusal hearing.

In the current case, it is unclear what would have happened had Blackman refused Deputy Abler's request for a blood sample under § 343.305(3)(ar). It is unclear whether Deputy Abler would have had probable cause to arrest Blackman for an OWI-related offense, or probable cause sufficient to request a PBT or field sobriety tests, if Blackman had refused. It makes no difference, because Blackman consented to a blood draw. What is clear is that Blackman's consent was coerced because Deputy Abler informed him his operating privilege would be revoke dif he refused. Blackman was correctly informed of the consequences of a refusal, and his consent was not coerced or involuntary.

F. The legislature did not intend that whether there was probable cause to arrest and an actual arrest for an OWI-related offense, be issues at a hearing for a refusal under § 343.305(3)(ar).

The circuit court concluded that a person who refuses under § 343.305(3)(ar) prevails at a refusal hearing if he or she can show under § 343.305(9)(a)5.a. that that officer did

not have probable cause to arrest for an OWI-related offense, or did not lawfully place the person under arrest for an OWI-related offense (23:4; R-Ap. 104).

As explained above, the circuit court erred in concluding that a revocation for a refusal under § 343.305(3)(ar) and then a refusal under § 343.305(3)(a) would be "statutorily unenforceable," and that Blackman's consent to a blood draw upon a request under § 343.305(3)(ar) was therefore coerced.

In addition, the circuit court's interpretation of § 343.305(9)(a)5., as providing that whether the officer had probable cause to arrest for an OWI-related offense, and did arrest for an OWI-related offense, is contrary to the intent of the legislature in creating § 343.305(3)(ar). The language in § 343.305(9)(a) at issue provides as follows:

> **5.** That the issues of the hearing are limited to:
>
> **a.** Whether the officer had probable cause to believe the person was driving or operating a motor vehicle while under the influence of alcohol, a controlled substance or a controlled substance analog or any combination of alcohol, a controlled substance and a controlled substance analog, under the influence of any other drug to a degree which renders the person incapable of safely driving, or under the combined influence of alcohol and any other drug to a degree which renders the person incapable of safely driving, having a restricted controlled substance in his or her blood, or having a prohibited alcohol concentration or, if the person was driving or operating a commercial motor vehicle, an alcohol concentration of 0.04 or more and whether the person was lawfully placed under arrest for violation of s. 346.63 (1), (2m) or (5) or a local ordinance in conformity therewith or s. 346.63 (2) or (6), 940.09 (1) or 940.25.
>
> **b.** Whether the officer complied with sub. (4).
>
> **c.** Whether the person refused to permit the test. The 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.

Wis. Stat. § 343.305(9)(a)5.

The circuit court concluded that to uphold a revocation at a refusal hearing, a court is required "to find probable cause that an operator was under the influence of alcohol or a controlled substance" (23:4; R-Ap. 104). This court appears to have read the statutory language the same way in *Padley*.

In *Padley*, this court concluded that "contextual clues" indicate that "the legislature intended to allow a driver at a refusal hearing the opportunity to challenge each element necessary for an officer to have requested that the driver submit to a blood draw." *Padley*, 354 Wis. 2d 545, ¶ 66 n.12. The court concluded that because of a drafting error, the legislature failed to incorporate language referring to the officer believing the person was involved in an accident that caused death or great bodily harm, and believing that the person committed a traffic violation. *Id.*

It appears that the "contextual clues" this court referred to in *Padley*, involve the notice of intent to revoke. When a person refuses under § 343.305(3)(a), the officer issues a notice of intent to revoke, which informs the person "[t]hat prior to a request under sub. (3)(a), the officer had placed the person under arrest for" an OWI-related offense, "or had requested the person to take a test under sub. (3)(ar)." Wis. Stat. § 343.305(9)(a)1. The notice of intent to revoke also informs the person that the officer read the Informing the Accused form to the person, the person refused, and the person may request a hearing within ten days. Wis. Stat. § 343.305(9)(a)2. - 4.

The notice of intent to revoke further informs the person "[t]hat the issues of the hearing are limited to:" "Whether the officer had probable cause to believe the

person" committed an OWI-related offense, whether the officer read the Informing the Accused form to the person, and whether the person refused. Wis. Stat. § 343.305(9)(a)5.

As this court likely recognized in *Padley*, the possible issues at the refusal hearing correspond to the information the person is given in the notice of intent to revoke, except in the case of a refusal under § 343.305(3)(ar).

This court in *Padley* concluded that "the legislature intended to allow a driver at a refusal hearing the opportunity to challenge each element necessary for an officer to have requested that the driver submit to a blood draw." *Padley*, 354 Wis. 2d 545, ¶ 66 n.12. This court attributed the "apparent disconnect" in the statute to "drafting error," and "an inadvertent failure to amend the refusal hearing references at the time the legislature enacted Wis. Stat. § 343.305(3)(ar)2." *Padley*, 354 Wis. 2d 545, ¶ 66 n.12.

The State agrees that the legislature could not have intended that at a refusal hearing after a person refuses under § 343.305(3)(a) and § 343.305(3)(ar), the person prevails unless the officer had probable cause to arrest for an OWI-related offense and then did arrest for an OWI-related offense. That outcome would undermine the intent of the statute.

The legislature has authorized law enforcement officers to request a sample under § 343.305(3)(ar), arrest the person if he or she refuses, then request a sample under § 343.305(3)(a), and if the person refuses again, to issue a notice of intent to revoke. That notice contains information that the officer "had requested the person to take a test under sub. (3)(ar)." Wis. Stat. § 343.305(9)(a)1. The legislature has also required a court to hold a refusal hearing when it is informed that a person who refused under § 343.305(3)(ar) has requested a hearing. Wis. Stat. § 343.305(9)(c).

The legislature could not reasonably have intended that a person who improperly refused, escape revocation when the officer and the court followed the required procedures.

The State maintains, however, that contrary to this court's view of the legislative intent in *Padley*, the legislature may not have intended to allow a person to challenge the basis for a blood draw under § 343.305(3)(ar), but may have simply intended that the issues at a hearing for a refusal under § 343.305(3)(ar) are whether the officer read the Informing the Accused form to the person, and whether the person refused.

In interpreting a statute, a reviewing court "begins with the plain language of the statute." *State v. Dinkins*, 2012 WI 24, ¶ 29, 339 Wis. 2d 78, 810 N.W.2d 787, (citing *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110). A court "generally give[s] words and phrases their common, ordinary, and accepted meaning." *Id.* (citing *Kalal*, 271 Wis. 2d 633, ¶ 45). A reviewing court is to "interpret statutory language reasonably, 'to avoid absurd or unreasonable results.'" *Id.* (citing *Kalal*, 271 Wis. 2d 633, ¶ 46). "An interpretation that contravenes the manifest purpose of the statute is unreasonable." *Id.* (citing *Kalal*, 271 Wis. 2d 633, ¶ 49).

The language of § 343.305(9)(a)5. supports the legislature's intent to not allow a person who refuses under § 343.305(3)(ar) to challenge probable cause or an arrest for an OWI-related offense, or whether the person was involved in an accident causing death or great bodily harm and whether the officer had reason to believe the person violated a traffic law. The statute says that the issues at a refusal hearing "are limited to" those listed in § 343.305(9)(a)5.a.-c. The word "limited" means "[c]onfined or restricted within certain limits." American Heritage Dictionary of the English Language (5th ed. 2015). "Limited" is also defined

as "Restricted; bounded; prescribed. Confined within positive bounds; restricted in duration, extent, or scope." Black's Law Dictionary (6th ed. 1990).

The statute does not say that all of the listed issues will be presented at every refusal hearing. By use of the word "limited," the statute simply precludes other issues from being raised at a refusal hearing.

Under this interpretation of the language in § 343.305(9)(a)5., a person who was arrested for an OWI-related offense and refused under § 343.305(3)(a) can challenge whether the officer had probable cause to arrest for an OWI-related offense, whether the person was lawfully placed under arrest for an OWI-related offense, whether the officer gave the person the Informing the Accused information, and whether the person refused.

But a person who refused under § 343.305(3)(ar), and then after arrest refused under § 343.305(3)(a), but is not arrested for an OWI-related offense, can challenge only whether the officer read the Informing the Accused form to him or her, and whether he or she refused.

In 2005, the legislature enacted 2005 Wis. Act 413, which created Wis. Stat. § 343.305(3)(ar), authorizing law enforcement officers to request a sample from persons involved in accidents that cause death or great bodily harm when the officer detects the presence of alcohol or controlled substances. In the same act, the legislature amended § 343.305(9)(a)1., adding the language "or had requested the person to take a test under sub. (3)(ar)." 2005 Wis. Act 413. The legislature also amended § 343.305(8)(b)2.e, which concerns the issues at an administrative hearing for a person who gives a sample which upon testing, reveals a prohibited alcohol concentration, or the presence of a restricted controlled substance. Under the old provision, "whether probable cause existed for the arrest" was an issue at a hearing on the administrative suspension. When the legislature added § 343.305(3)(ar), authorizing the taking of

samples without probable cause to arrest for an OWI-related offense, it amended § 343.305(8)(b)2.e. to remove probable cause as an issue at an administrative hearing. 2005 Wis. Act 413. The new law restates the issue as, "[i]f a test was requested under sub. (3)(a), whether probable cause existed for the arrest."

The legislative history indicates that the change to § 343.305(8)(b)2.e. resulted from Assembly Amendment AA 1 to SB 611, the Senate Bill that became 2005 Wis. Act 413. The drafting instructions for AA 1 were to "exempt probable cause for these violations." 2005 Drafting Request for Assembly Amendment AA 1 to SB 611, April 21, 2006; (R-Ap. 156).

A Legislative Council Amendment Memo confirms that the legislature intended to remove probable cause as an issue at refusal hearings for a person who refuses under § 343.305(3)(ar). The memo notes that under current law, "[t]he issues at the hearing are limited, and one of the issues is whether the officer had probable cause to arrest the person." The memo then explains AA 1, as follows:

> **Assembly Amendment 1** provides that whether the officer had probable cause to arrest the person is not an issue at a hearing to contest a revocation based upon a refusal to take a test as provided under the bill because the person is not required to be arrested before the test may be requested.

Wisconsin Legislative Council Amendment Memo for AA 1 to 2005 SB 611, April 27, 2006; (R-Ap. 156). The amendment was offered and adopted by the Assembly Committee on Criminal Justice and Homeland Security, and became part of the bill that became 2005 Wis. Act 413. Wisconsin Legislative Council Amendment Memo for AA 1 to 2005 SB 611, April 27, 2006; (R-Ap. 157).

While the Legislative Council Memo states that the Assembly Amendment was proposed in order to make clear that probable cause is not an issue at a hearings on a refusal

under § 343.305(3)(ar), it appears that the amendment instead removed probable case as an issue at hearings on administrative suspensions under § 343.305(8)(b)2.e. In other words, it removed probable cause as an issue for persons who take the test, not for those who refuse.

Wisconsin Stat. § 343.305(3)(ar)2. was created by 2009 Wis. Act 163. That act authorized chemical testing when there is an accident causing death or great bodily harm, and a law enforcement officer believes a person has violated a traffic law. The act also amended § 343.305(4), which provides the information an officer reads to a person when requesting a sample, to include "or you are the operator of a vehicle that was involved in an accident that caused the death of, or great bodily harm to, or substantial bodily harm to a person." 2009 Wis. Act 163 did not amend the issues that can be raised at a refusal hearing.

The State is unable to find anything in the legislative history of 2005 Wis. Act 413 or 2009 Wis. Act 163 indicating that the legislature intended to allow a person from whom a sample is requested under § 343.305(3)(ar) to challenge the basis for the request at a refusal hearing. Instead, the legislative history suggests that the legislature simply intended that probable cause to arrest for an OWI-related offense not be an issue at a hearing for a refusal under § 343.305(3)(ar). The issues would be only those listed in § 343.305(9)(a)5.b., and c., "[w]hether the officer complied with sub. (4)," and "[w]hether the person refused to permit the test."

Whether § 343.305(9)(a)5. is interpreted as allowing a person who refuses under § 343.305(3)(ar) to challenge the basis for the request for a sample, or whether the person can challenge only whether the officer read the Informing the Accused form and whether the person refused, it is apparent that the legislature did not intend to allow a person who refuses under § 343.305(3)(ar) to escape revocation because the officer did not have probable cause to arrest for an OWI-

related offense, or did not lawfully place the person under arrest for an OWI-related offense.

G. Blackman was properly informed of the consequences of a refusal and his consent was not coerced or involuntary.

When an officer properly informs a person of the potential consequences under the implied consent law, and does not engage in deceit or trickery, the person's consent is neither involuntary nor coerced. *Padley*, 354 Wis. 2d 545, ¶ 72 (citing *Walitalo*, 256 Wis. 2d 1032, ¶ 11).

In this case, Deputy Abler read the Informing the Accused form to Blackman, and correctly informed him that if he refused a requested blood draw, his operating privilege would be revoked. Blackman then consented to a blood draw. Blackman was not coerced into consenting. If anything, the Informing the Accused form understated the consequences of refusing because it did not tell Blackman that if he refused, not only would his operating privilege be revoked, but he would be arrested.

The legislature did not intend that a person like Blackman be able to escape revocation because the officer did not have probable cause to arrest for an OWI-related offense, or did not lawfully place him under arrest for an OWI-related offense. Blackman agreed to a blood draw seemingly believing that if he refused, his operating privilege would be revoked. Because this is precisely the consequence that the legislature intended for a person who refuses under §343.305(3)(ar), Blackman's consent was not coerced or involuntary. Accordingly, the circuit court's order suppressing the results of his blood test should be reversed.

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.

Dated this 31st day of July, 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 words.

_____
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 31st day of July, 2015.

_____
Michael C. Sanders
Assistant Attorney General

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2015AP450-CR

STATE OF WISCONSIN,

Plaintiff- Appellant,

v.

ADAM M. BLACKMAN,

Defendant- Respondent.

ON APPEAL FROM A DECISION AND ORDER GRANTING A MOTION TO SUPPRESS EVIDENCE, ENTERED IN THE CIRCUIT COURT FOR FOND DU LAC COUNTY, THE HONORABLE GARY SHARPE, PRESIDING

APPENDIX OF PLAINTIFF-APPELLANT

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INDEX TO SUPPLEMENTAL APPENDIX

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix that complies with the content requirements of Wis. Stat. § (Rule) 809.19(2)(a); that is, the record documents contained in the respondent's supplemental appendix fall into one of the categories specified in sub. (2)(a).

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including

juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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Michael C. Sanders
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(13)

I hereby certify that I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § (Rule) 809.19(13).

I further certify that this electronic appendix is identical in content to the printed form of the appendix filed as of this date.

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

Dated this 31st day of July, 2015.

_____
Michael C. Sanders
Assistant Attorney General