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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appellate Case No. 2015 AP 450-CR
Trial Court Case No. 13 CF 659

STATE OF WISCONSIN,

Plaintiff-Appellant,

-vs-

ADAM M. BLACKMAN,

Defendant-Respondent.

RESPONSE BRIEF AND APPENDIX OF DEFENDANT-RESPONDENT

Appealed from a Judgment of Conviction Entered
In the Circuit Court for Fond du Lac County
The Honorable Gary Sharpe Presiding

Respectfully Submitted:

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STATEMENT OF THE ISSUES

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Trial Court Answered: **Yes.**

II. WHETHER SECTION 343.305(3)(AR)2 IS UNCONSTITUTIONAL ON ITS FACE AND AS-APPLIED TO MR. BLACKMAN BECAUSE IT COERCES CONSENT TO OTHERWISE UNCONSTITUTIONAL SEARCHES WITHOUT DUE PROCESS OF LAW?

Trial Court did not reach this issue.

STATEMENT ON ORAL ARGUMENT

The Defendant-Respondent believes oral argument is unnecessary in this case. Pursuant to Rule 809.22(2)(b), Stats.,

the briefs will fully develop and explain the issues. Therefore, oral argument would be of only marginal value and would not justify the expense of court time.

STATEMENT ON PUBLICATION

The Defendant-Respondent believes publication of this case is necessary. This case involves a unique set of facts and arguments that have not been fully addressed by prior published decisions.

STATEMENT OF FACTS AND CASE

On June 22, 2013, at approximately 10:10 a.m. Deputy John Abler was dispatched to a car/bicycle accident.[1] (R23 at 1.) Deputy Abler spoke with witnesses, including the driver of the car, Adam Blackman, the Defendant-Respondent. (R23 at 1.); (R36 at 5.) Deputy Abler indicated that he learned during

1 The transcript from the motion hearing indicates that Deputy Abler testified that he was dispatched on June 27, 2013. (R36 at 4.) All other documents, however, use the June 22 date, as will this brief.

his investigation that the car was making a left turn when "the bicycle collided with the right front area of the car." (R36 at 6.)

Further, Deputy Abler believed that Mr. Blackman may have failed to yield while making his left turn. (R36 at 6.) As a result of the accident, the bicyclist did sustain great bodily harm. (R36 at 15.); (R23 at 1.)

Deputy Abler later testified that it is "standard operating procedure for the department, when drivers are involved in accidents of a serious nature, to obtain a blood sample." (R36 at 6-7.) Accordingly, Deputy Abler transported Mr. Blackman to a hospital. (R36 at 15-16.) While Deputy Abler could not remember the specifics of the conversation he had with Mr. Blackman, he was "sure" that he told Mr. Blackman his department's "normal procedure… [to] take blood samples." (R36 at 15-16.)

Importantly, Mr. Blackman was not under arrest for any wrongdoing at the time of his transport and had not been issued any citations. (R36 at 11.)

During all the time Deputy Abler spoke with Mr. Blackman he did not notice an odor of an intoxicant. (R36 at 9-11.) In fact, Deputy Abler made no observations that Mr. Blackman might be impaired in any way. (R36 at 10.) Specifically, Deputy Abler testified as follows:

Q: You noticed no odor of intoxicants coming from him?

A: That's correct.

Q: You noticed no slurred speech?

A: That is correct.

Q: You noticed no bloodshot eyes?

A: That is correct.

Q: You noticed no glassy eyes?

A: Correct.

Q: You noticed no glassy eyes?

A: Correct.

Q: Okay. You noticed no signs with his balance or coordination?

A: I did not notice anything.

Q: You did not notice any mental impairment on his part, meaning it didn't seem like he was intoxicated or impaired in any way. Would you agree?

A: I agree.

Q: Okay. And, in fact, during your entire contact with Mr. Blackman, you never observed anything that you would have attributed to even the consumption of alcohol. Would you agree?

A: I agree.

Q: …. You never - - I think we asked this already. You never observed an odor coming from him; is that right?

A: I did not detect an odor.

(R36 at 9-11.)

Once at the hospital, Mr. Blackman was read the Informing the Accused Form. (R36 at 7.) The circuit court found that the deputy's request for blood was based on Section 343.305(3)(ar)2, which states in part:

> If a person is the operator of a vehicle that is involved in an accident that causes the death or great bodily harm to any person and the law enforcement officer has any 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 breath, blood or urine…. **If a person refuses to take a test under this subdivision, he or she may be arrested under par. (a).**

See (R23 at 1.); *see also* Wisconsin Statute § 343.305(3)(ar)2(emphasis added).

Rather than informing Mr. Blackman that he "may be arrested" for refusing, Deputy Abler read the Informing the Accused form that told Mr. Blackman, in part:

> 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.

See (R36 at 7,12-13.); Wisconsin Statute § 343.305(4).

Mr. Blackman then agreed to the blood test. (R36 at 8.) The blood test result allegedly indicated a prohibited alcohol concentration. (R1 at 2.)

Mr. Blackman was later charged with Reckless Driving Causing Great Bodily Harm, Injury by intoxicated Use of a Vehicle, Injury by use of a Motor Vehicle with a Prohibited Alcohol Concentration, Operating a Motor Vehicle While

Intoxicated (Causing Injury – First Offense) and Operating a Motor Vehicle with a Prohibited Alcohol Concentration (Causing Injury – First Offense). (R13.)

Subsequently, Mr. Blackman filed two motions—only the Motion to Suppress the blood test result is relevant to this appeal. (R19.) Mr. Blackman's arguments for suppression fell into two categories. First, that Mr. Blackman's consent to the blood test was unconstitutionally coerced. (R19 at 2-8.) Second, that Section 343.305(3)(ar) of the Implied Consent Law is unconstitutional, both on its face and as applied to Mr. Blackman. (R19 at 8-12.)

On October 17, 2014, a motion hearing was held. (R36.) The State's argument before the circuit court below was limited to telling the circuit court that the Court of Appeals has already ruled on the issue of whether the Informing the Accused form is "a coercive mechanism to obtain consent" and found it is a reasonable form of coercion, and that a person is required to

make a difficult choice, but that it is a choice nonetheless. (R36 at 20-22.)(citing *State v. Wintlend*, 2002 WI App 314, 258 Wis. 2d 875 and *State v. Padley*, 2014 WI App 65, 354 Wis. 2d 545).

Lastly, the State argued that the officer was acting according to "standard operating procedure," so if the circuit court felt that the procedure was not constitutional, that the officer was acting in good faith based on his standard procedure and what the law has been. (R36 at 22-23.)

Mr. Blackman responded by distinguishing *Wintlend* and *Padley*. Most importantly, Mr. Blackman quoted the *Padley* decision where the court found a "disconnect" between Section 343.305(3)(ar)2 and the statutes governing refusal hearings.[2] (R36 at 25-26.); *Padley*, Wis. 2d at ¶66 n.12.

Mr. Blackman argued that the "disconnect" was that "any person in Mr. Blackman's position is not subject to license

2 The *Padley* court concluded that had Ms. Padley refused, she would have won her refusal hearing. *Padley*, 354 Wis.2d at ¶66 n.12.

revocation." (R36 at 27.) Rather, Mr. Blackman argued that "only a driver who has been lawfully arrested for an OWI-related incident is facing a license revocation if they refuse." (R36 at 27.) Mr. Blackman, to the contrary, was only facing possible arrest under Section 343.305(3)(ar)2. (R36 at 27.)

At that point, the circuit court interrupted Mr. Blackman and asked:

The question of the century is **arrested for what?**

(R36 at 28.)(emphasis added).

Mr. Blackman agreed that statute is flawed, and continued by arguing that the State's reliance on prior case law was misplaced. Specifically, Mr. Blackman pointed out that in those prior cases where the Court of Appeals upheld the threat of a driver's license revocation—in an attempt to nudge the

suspected drunk driver into consent—that the person was actually facing a driver's license revocation.[3] (R36 at 28.)

Again, if Mr. Blackman refused—he was only facing the possibility of being arrested. *See* (R36 at 27, 28-29.); Wisconsin Statute § 343.305(3)(ar)2.

Thus, Mr. Blackman argued he was misinformed when the Informing the Accused form told him that if he refused testing, his license would be revoked and he would be subject to other penalties. *See* (R36 at 12, 28-30.) Accordingly, Mr. Blackman argued that he could not have given valid consent, as his decision was based on "a threatened penalty that did not apply to him." (R36 at 29.)

Moreover, because Mr. Blackman's coerced consent was based on the disconnect between Sections 343.305(3)(ar)2 and 343.305(4) – that Section 343.305(3)(ar)2 is unconstitutional on

3 The *Padley* court, did not address this issue directly, in part, because Ms. Padley "failed to raise this argument in the circuit court." *Padley*, 2014 WI

its face. (R36 at 30.) Moreover, Mr. Blackman argued that at the very least, it is unconstitutional as applied to him.

In summary, Mr. Blackman argued that under the totality of the facts, his consent was unconstitutionally coerced. Furthermore, the coercion was due to the way the Implied Consent Law was written and applied to him. (R36 at 31-32.)

The circuit court then took the case under advisement. Further, the circuit court indicated that the Office of the Attorney General could provide additional input if they had intended to do so, but lacked notice of the actual hearing date. (R36 at 32-36.) Neither the Office of the District Attorney nor the Office of the Attorney General provided the circuit court with further arguments.

On January 20, 2015, the circuit court filed its written decision granting Mr. Blackman's Motion to Suppress the blood test because his consent was coerced. (R23.) Specifically, the

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App at ¶66 n12.

circuit court found that at the time Mr. Blackman was read the Informing the Accused form, the threatened revocation was "statutorily unenforceable." (R23 at 4.) The circuit court did not reach the issue of the constitutionally of Section 343.305(3)(ar). (R23 at 5.)

The State then appealed the circuit court's decision granting Mr. Blackman's motion to suppress.

STANDARDS 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 (external citation omitted). A question of constitutional fact is a mixed question of law and fact to which appellate courts apply a two-step standard of review. *State v. Post*, 2007 WI 60 ¶8, 733 N.W.2d 634. First, appellate courts review the trial court's findings of historical fact under the clearly erroneous standard. *Id*. Second, appellate

courts independently review the application of those facts to constitutional principles. *Id*.

The constitutionality of a statute is a question of law which appellate courts review de novo. *State v. Padley*, 2014 WI App 65, ¶16, 354 Wis. 2d 545, 849 N.W.2d 867. All legislative acts are presumed constitutional and appellate courts must indulge every presumption to sustain the law. *State v. Randall*, 192 Wis. 2d 800, 824, 532 N.W.2d 84 (1995). Any doubt that exists regarding the constitutionality of the statute must be resolved in favor of its constitutionality. *See Padley*, 2014 WI App at ¶16.

ARGUMENT

I. MR. BLACKMAN WAS UNCONSTITUTIONALLY COERCED INTO TAKING THE BLOOD TEST.

Citizens have the right to be free from "unreasonable searches and seizures."[4] *State v. Richardson*, 156 Wis. 2d 128,

4 The Fourth Amendment of the United States Constitution provides:

137, 456 N.W.2d 830 (1990)(citing the Fourth Amendment to the United States Constitution and Article I sec. 11 of the Wisconsin Constitution). A blood draw conducted at the direction of a police officer is a search subject to the Fourth Amendment requirement that all searches must be reasonable. *Padley*, WI App at ¶23.

Warrantless searches are per se unreasonable, subject to a few "well-delineated" exceptions. *Padley*, 2014 WI App at ¶8 (citation omitted). "When the purported legality of a warrantless

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> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article I, Section 11 of the Wisconsin Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be search and the persons or things to be seized.

search is based on the consent of the defendant, that consent must be freely and voluntarily given." *State v. Johnson*, 2007 WI 32, ¶16, 229 Wis. 2d 675, 729 N.W.2d 182 (citing *State v. Phillips*, 218 Wis. 2d 180, 197, 577 N.W.2d 794 (1998)).

The State bears "the burden of proving that consent was, in fact, freely and voluntarily given." *Bumper v. North Carolina*, 391 U.S. 543, 548, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968). "Acquiescence to an unlawful assertion of police authority is not equivalent to consent." *Johnson*, 2007 WI at ¶16 (citing *Bumper*.)

Accordingly, police cannot assert that they have a right to conduct a warrantless search, or indicate that they are going to search absent legal authority to do so. *Id*. In other words, as this Court has explained, "orderly submission to law enforcement officers who, in effect, incorrectly represent that they have the authority to search and seize property, is not knowing, intelligent and voluntary consent under the Fourth

Amendment." *Padley*, 2014 WI App at ¶62 (quoting *State v. Giebel*, 2006 WI App 239, ¶18, 297 Wis. 2d 446, 724 N.W.2d 402.).

In the present case, the only exception to the warrant requirement argued by the State before the circuit court, was that Mr. Blackman consented to the blood test. *See* (R36 at 20-22.) The circuit court, however, found that Mr. Blackman's consent was unconstitutionally coerced and suppressed the test result. (R23 at 4-5.)

A. As found by circuit court, Mr. Blackman's consent was unconstitutional coerced by the misleading language contained in the Informing the Accused form.

In this case, Mr. Blackman was not suspected of being impaired at the time of the accident. (R23 at 4.); (R36 at 10.) Thus, Mr. Blackman was not arrested by Deputy Abler for an OWI-related offense—or indeed any offenses—at the time Mr. Blackman was asked to submit to a blood test. (R36 at 11, 14.)

Accordingly, the circuit court found that Mr. Blackman was requested to submit to a blood test pursuant to Wisconsin Statute Section 343.305(3)(ar)2. (R23 at 1.)

Section 343.305(3)(ar)2 states, in part:

> If a person is the operator of a vehicle that is involved in an accident that causes the death or great bodily harm[5] to any person and the law enforcement officer has any reason to believe that the person violated any state or local traffic law,[6] the officer may request the operator to provide one or more samples of his breath, blood or urine…. **If a person refuses to take a test under this subdivision, he or she may be arrested under par. (a).**

Wisconsin Statute § 343.305(3)(ar)2 (emphasis added).

Mr. Blackman, however, was not informed that if he refused to take the test, that the officer "may" arrest him. Rather, Mr. Blackman was read the Informing the Accused form which stated, in relevant part:

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5 Mr. Blackman does not dispute that the bicyclist sustained great bodily harm. (R23 at 1.); (R36 at 15.)

6 Deputy Abler testified that he believed that Mr. Blackman failed to yield while making a left turn. (R36 at 6.) Mr. Blackman does not dispute that the deputy "had reason to believe" that Mr. Blackman violated a traffic law. The circuit court found that "the officer concluded that the defendant failed to yield the right of way to the bicyclist." (R23 at 1.)

> **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.**

See (R36 at 7,12-13.); Wisconsin Statute § 343.305(4).

Importantly, the circuit court did not initially find this "misleading" because the circuit court believed there was a "potential for revocation" if Mr. Blackman was then arrested—as indicated in Section 343.305(3)(ar)2—and if the officer reread the Informing the Accused a second time, and Mr. Blackman refused a second time. *See* (R23 at 3.)

The circuit court, however, found that had that occurred, and Mr. Blackman was issued a Notice of Intent to Revoke pursuant to Section 343.305(9), that Mr. Blackman's revocation was "statutorily unenforceable." (R23 at 4.)

As the trial court explained, Section 343.305(9) requires a court to find probable cause that the suspected operator "was under the influence" of an intoxicant to sustain the revocation for refusing. *Id*. In this case, however, the circuit court held

that "we know that for Mr. Blackman, there was no such probable cause and no likelihood a revocation would be upheld." (R23 at 4.)

Critically, the State has not challenged the circuit court's finding that Deputy Abler lacked probable cause to believe Mr. Blackman was impaired.

The circuit court's decision then questioned how the threatened revocation read to Mr. Blackman could not be considered improper coercion when the revocation would be impossible to sustain at a refusal hearing. (R23 at 4.) Specifically, the circuit court stated:

> This Court struggles to understand the legislative disconnect between Section 343.305(3)(ar)2 and Section 343.305(9)(c). 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….

> The very nature of an enforceable consent is that the individual consenting not be threatened. The *Padley* court [] has held that it is no coercion to force a motorist to choose between taking the test and having their license revoked. However, if the statutory scheme does not support a revocation that is threatened, this Court finds that coercion has occurred. As a consequence, the Court will grant suppression of the blood test result because of this coercion.

(R23 at 4-5.)

Importantly, the circuit court's decision was not based on it misunderstanding that under the Implied Consent Law, a person in Mr. Blackman's shoes is immediately revoked if they refuse the second test request made pursuant to Section 343.305(3)(a) and further that they must request a refusal hearing to "prevail." *See* (State's br. at 8.)("[T]he circuit court was incorrect. A revocation would have been enforceable unless Blackman both timely requested a refusal hearing, and then then prevailed at that hearing.")

Again, the circuit court understood that had Mr. Blackman continued refusing testing, that his license would be revoked. For example, the circuit court stated that:

> If Mr. Blackman refused the Section (3)(ar)2 request, was arrested and refused the (3)(a) request **and was revoked**, his revocation would be reversed under Section 343.305(9) [commonly called a "refusal hearing"].

(R23 at 4.)(emphasis added).

Rather, the circuit court's decision was based on the unfairness/coerciveness of the Informing the Accused form being read to people where there is no probable cause to believe they are impaired. In these cases, drivers are being told that they face a driver's license revocation and other penalties if they refuse, yet there is no possibility of a court upholding the revocation at a refusal hearing.

In other words, for people in Mr. Blackman's position, the Informing the Accused form does not accurately inform them of their precise legal situation. Thus, this case is

distinguishable from cases cited by the State for the proposition that the Implied Consent Law is not unreasonably coercive. *See e.g. Village of Little Chute v. Walitalo*, 2002 WI App 211, 256 Wis. 2d 1032, 650 N.W.2d 891; *State v. Wintlend*, 2002 WI App 314, 258 Wis. 2d 875, 655 N.W.2d 745; *Padley*, 2014 WI App 65.

Walitalo, *Wintlend* and *Padley*, all say that the Informing the Accused form does "not involve any deceit or trickery, but instead accurately informed *Walitalo* of his **precise legal situation**." *Walitalo*, 2002 WI App at ¶11(emphasis added); *Wintlend*, 2002 WI App at ¶3; and *Padley*, 2014 WI App at ¶72. These cases and this quote are cited numerous times in the State's brief. (State's br. at 7, 8, 26.)

Walitalo, *Wintlend* and *Padley* can be further distinguished as they do not address the problem with the "disconnect" between Section 343.305(3)(ar)2 and the statutes governing refusal hearings. Specifically, *Walitalo* and *Wintlend*

were decided before Section 343.305(3)(ar)2 was created by 2009 Wis. Act 163, effective March 10, 2010. The court in *Padley* did not address the "disconnect," because Ms. Padley, in part, failed to raise the issue before the circuit court. *Padley*, 2014 WI App ¶66 n.12.

Importantly, the State only argued before the circuit court below that prior case law had found the Informing the Accused form was not coercive. (R36 at 19-22.) As Mr. Blackman explained to the circuit court below, and here, the State has misplaced its reliance on those cases. Thus, the State has failed to show that the circuit court's finding that Mr. Blackman was unconstitutionally coerced by the misleading language in the Informing the Accused form.

The State's other arguments in its brief are made for the first time on appeal. A fundamental appellate precept is that appellate courts "will not ... blindside trial courts with reversals based on theories which did not originate in their forum." *State*

v. Rogers, 196 Wis. 2d 817, 827, 539 N.W.2d 897 (Ct. App. 1995). "[T]he appellant [must] articulate each of its theories to the trial court to preserve its right to appeal." *Id*. at 828-29.

Moreover, all of the State's arguments attempting to say that the Informing the Accused form is "technically" correct, require interpretations which the circuit court inherently rejected. As the circuit court indicated below, "enforceable consent" requires more than Mr. Blackman was provided in the Informing the Accused form. (R23 at 4-5.)

B. Under the totality of the circumstances, including the misleading information in the Informing the Accused form, Mr. Blackman's consent was unconstitutionally coerced.

Mr. Blackman believes the circuit court's decision below finding that the Informing the Accused from was unconstitutionally coercive is correct. The circuit court's decision is further solidified, however, when considering the

totality of the circumstances Mr. Blackman was facing when he consented to the blood test.

Importantly, Mr. Blackman was told by Deputy Abler that "our normal procedure [] when there is a serious accident like this, that we do take blood samples."[7] (R36 at 16.) Deputy Abler continued by noting that Mr. Blackman "did not disagree or refuse or give me any indication that he was going to refuse." (R36 at 16.)

This is exactly the type acquiescence to an unlawful assertion of police authority prohibited by case law. *See Johnson*, 2007 WI at ¶16. In *Johnson*, the Wisconsin Supreme Court found that the defendant had not "freely and voluntarily give his consent" to search his car after a traffic stop. *Id*. at ¶19. Specifically, the police officers testified that they advised the defendant that "due to his movements that we were going to

7 Deputy Abler stated he was "sure" he told Mr. Blackman this, but could not remember the exact conversation. (R36 at 16.)

search the vehicle [and that] Mr. Johnson didn't have a problem with that." *Johnson*, 2007 WI at ¶18.

Likewise in this case, Deputy Abler had no authority to "take blood" in this case. Rather, Deputy Abler only had the lawful authority to ask Mr. Blackman if he would consent to a blood test under Section 343.305(3)(ar)2. *See Padley*, 2014 WI App at ¶70 ("offering [a] choice, rather than requiring a blood draw, makes all the difference.")

Yet Deputy Abler indicated to Mr. Blackman that he had no choice because "our normal procedure is… [to] take blood." (R36 at 16.)

Accordingly, in addition to the misinformation provided in the Informing the Accused form discussed above, when one considers the totality of the circumstances surrounding Mr. Blackman's consent to take the test – it becomes more clear that his consent was unconstitutional coerced.

In other words, Mr. Blackman was told by a deputy at the scene of a serious accident that it was their standard procedure to "take blood." (R36 at 16.) Mr. Blackman was then placed in a squad car and transported to a hospital, again, acquiescing to the deputy's stated authority. Once at the hospital, Mr. Blackman was told that if he refused the blood test, his license would be revoked and that he would be subject to other penalties. (R36 at 7, 12-13.) Thus, based on the information provided to Mr. Blackman by the deputy, it becomes clear that one of the other "penalties" would be a blood draw, regardless of his consent.

Therefore, Mr. Blackman was faced with more than the misleading Informing the Accused form, he was also told that his blood was going to be taken because of the serious accident. Under these circumstances, one cannot say that Mr. Blackman's consent was "knowingly, intelligent and voluntary consent under the Fourth Amendment." *See Johnson*, 2014 WI at ¶62.

II. SECTION 343.305(3)(AR)2 IS UNCONSTITUTIONAL ON ITS FACE AND AS-APPLIED TO MR. BLACKMAN BECAUSE IT COERCES CONSENT TO OTHERWISE UNCONSTITUTIONAL SEARCHES WITHOUT DUE PROCESS OF LAW.

Procedural due process requires fair notice and proper standards for adjudication. *State ex rel. Hennekens v. River Falls Police Fire Comm'n*, 124 Wis. 2d 413, 420, 369 N.W.2d 670 (1985). A law violates due process when those who must enforce and apply the law end up creating or applying their own standards. *State v. Pittman*, 174 Wis. 2d 255, 276, 496 N.W.2d 74 (1993).

While the circuit court below indicated that it was not reaching the issue of the constitutionality of Section 343.305(3)(ar)2, this Court should decide this issue based on the circuit court's decision. Specifically, the circuit court's decision below was that "the statutory scheme does not support a revocation that is threatened" and thus, found that the statute was unconstitutionally coercive. (R23 at 5.)

In other words, Section 343.305(3)(ar)2, is unconstitutional on its face. When someone is asked to submit to a chemical test, under the current statutory scheme – they will be misinformed of the consequences of their decision, and thus, cannot provide a "knowingly, intelligent and voluntary consent."

It is a distinction without a difference to say that the statute is unconstitutionally coercive, so Mr. Blackman's consent was not voluntary, but not take the next step and say that the statute is unconstitutional. Admittedly, appellate courts are to decide an issue on the narrowest of grounds, but the statutory scheme is broken as noted in *Padley* and needs to be rebuilt. *State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989)(appellate courts generally decide cases on the narrowest possible ground).

For example, the State attempts to rewrite the refusal statutes arguing that the "legislature's intent" could not be what they law says. (State's br. at 18-25.)("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)2.")

The State in its brief points out what it believes are multiple drafting errors. Specifically, the State discusses the *Padley* "disconnect" and says that one can assume the issues at a Section 343.305(3)(ar)2 refusal hearing are different than a refusal under Section 343.305(3)(a). (State's br. at 23.) In support of this argument, the State notes that the legislature had earlier intended to remove "probable cause" as an issue at refusal hearings, but instead "removed probable case [sic] as an issue at hearings on administrative suspensions under § 343.305(8)(b)2.e." (State's br. at 24-25.)(citing Wisconsin Legislative Council Amendment Memo for AA to 2005 SB 611, April 27, 2006).

Lastly, if this Court does not want to find Section 343.305(3)(ar)2 unconstitutional on its face because it might be

enforceable under some hypothetical facts, it can still be found to be unconstitutional as-applied to Mr. Blackman.

Again, the circuit court found that there was no probable cause to believe that Mr. Blackman was impaired. (R23 at 4.) Thus, he would never have been facing a revocation for refusing chemical testing.

In other words, regardless of how Mr. Blackman was informed under the Implied Consent law, because law enforcement was only proceeding under Section 343.305(3)(ar)2 – Mr. Blackman was only facing a possible arrest.

Critically, Mr. Blackman could not have been arrested for an OWI-related offense because the circuit court found that "there was no probable cause to believe impairment existed."[8]

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8 The State has previously argued to the Court of Appeals in its Response Brief in the *Padley* case that under either Section 343.305(3)(ar)2 or Section 343.305(3)(a) - that a person cannot be arrested for only refusing a chemical test. Specifically, the State argued:

> "[C]ontrary to the suggestion in Padley's brief, Brief for Defendant-Appellant at 14-15, there is nothing in either of these subsections which suggests that anyone can be

(R23 at 4.) Again, the State has not challenged this factual finding.

Rather, the State simply complained in its brief that "it is unclear what would have happened had Blackman refused Deputy Abler's request for a blood sample under § 343.305(3)(ar)." (State's br. at 18.) This complaint fails for three reasons. First, the State ignored the circuit court's finding that the deputy lacked probable cause necessary to arrest Mr. Blackman for an OWI-related offense. (R23 at 4.)("there was no probable cause to believe impairment existed.") Thus, with no lawful reason to arrest Mr. Blackman, he could not have been arrested and asked to take a second test under Section 343.305(3)(a).

> arrested without actual constitutionally adequate probable cause to believe they have committed an offense involving impaired driving."

(State's Response Br. at 9-10, *State v. Padley*, Appellate Case No. 2013 AP 852-CR)(Def.-App. at 101-102.)

Second, the State never raised this issue with the circuit court, presumably because it agreed that probable cause did not exist. Thirdly, the State cannot complain that we do not know what Mr. Blackman would have done had he refused the Section 343.305(3)(ar)2 test request, because ultimately, the State failed to accurately inform him that he was only facing a possible arrest if he refused, and coerced him into taking the test.

Accordingly, this Court should reach the decision left open by the circuit court and find Section 343.305(3)(ar)2 unconstitutional so that the "disconnects" with the law will be removed and allowed to be rebuilt. Under the current statutory scheme, as evidenced by the State's brief in this case, law enforcement, prosecutors and judges will need a "rewrite" of the law to provide due process and make the law work in a unified manner.

CONCLUSION

WHEREFOR, Mr. Blackman respectfully requests this Court affirm the circuit court's decision below to suppress evidence.

Dated this ____ day of November, 2015.

Respectfully submitted,

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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appellate Case No. 2015 AP 450-CR
Trial Court Case No. 13 CF 659

STATE OF WISCONSIN,

Plaintiff-Appellant,

-vs-

ADAM M. BLACKMAN,

Defendant-Respondent.

APPENDIX

Table of Contents

CERTIFICATION

I hereby certify that this brief meets the form and length requirements of Rule 809.64(4) in that it is proportional serif font. The text is 13 point type and the length of the brief is 5,604 words.

I hereby certify that filed with this brief, either as a separate document, is an appendix that complies with s. 809.62(2)(f) & 809.19(2) and that contains:

(1) a table of contents;
(2) the findings or opinion of the trial court; and
(3) the portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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.

I further certify that the electronically filed brief is identical in both content and format as the paper copy.

Dated this 24th day of November, 2015.

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