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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

REPLY BRIEF OF PLAINTIFF-APPELLANT

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ARGUMENT

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

A. Introduction.

The circuit court granted Blackman's motion to suppress the results of a blood test administered to him after

he submitted to an officer's request for a blood draw under Wisconsin's Implied Consent Law, Wis. Stat. § 343.305 (23). The circuit court concluded that Blackman's consent—or more accurately his submission—to an officer's request for a blood draw was coerced because he was improperly informed that his operating privilege would be revoked if he refused (23:4-5).[1] The court concluded that a revocation for refusal to submit to chemical testing under Wis. Stat. § 343.305(3)(ar)2 is statutorily unenforceable because a defendant who challenges the revocation would necessarily prevail at the revocation hearing. The court concluded that Blackman's submission to chemical testing was coerced because if he had refused, a revocation could not have been enforced (23:4-5).

In its initial brief, the State asserted that the circuit court erred because it misinterpreted the implied consent law. The State explained that a revocation under § 343.305(3)(ar)2 would be enforceable unless the person timely requested a refusal hearing, and prevailed at the hearing. The State further explained that the officer correctly informed Blackman of the consequences of a refusal, and that his consent or submission to a blood draw was not coerced.

On appeal, Blackman argues that the circuit court was correct because a revocation for refusal could not have been

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[1] As the State pointed out in its initial brief, 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 a blood draw when he or she operates a motor vehicle on a Wisconsin highway. But in *State v. Padley*, 2012 WI App 65, ¶¶ 25-27, 354 Wis. 2d 545, 849 N.W.2d 867, this court concluded that a person gives consent when an officer requests a blood sample (State's Br. at 7 n.2). When a person gives consent is at issue in a case that this court has certified to the Wisconsin Supreme Court, *State v. David W. Howes*, No. 2014AP1870-CR. The State's position is that under the plain language of Wis. Stat. § 343.305(2), by operating a motor vehicle on a Wisconsin highway, all persons have given consent to a blood draw when an officer validly requests or requires a blood sample.

enforced (Blackman's Br. at 16-24). He also argues that his submission to the blood draw was coerced because of other circumstances surrounding the blood draw (Blackman's Br. at 24-27). Finally, Blackman argues that § 343.305(3)(ar)2 is unconstitutional on its face, and as applied to him (Blackman's Br. at 28-33). As the State will explain, Blackman has not shown that the circuit court correctly granted his motion to suppress evidence, or that § 343.305(3)(ar)2 is unconstitutional.

B. The State's arguments are properly before this court.

In his brief, Blackman asserts that "the State only argued before the circuit court below that prior case law had found the Informing the Accused form was not coercive" (Blackman's Br. at 23). He argues that this court should therefore not consider the State's arguments about how the implied consent law works, and why the law is constitutional, because appellate courts should not "blindside trial courts with reversals based on theories which did not originate in their forum" (Blackman's Br. at 23-24) (quoting *State v. Rogers*, 196 Wis. 2d 817, 827, 539 N.W.2d 897 (Ct. App. 1995)).

The State is not asking this court to blindside the circuit court with a reversal on issues not presented to the circuit court. The issues before the circuit court concerned the workings of the implied consent law, and whether the law is constitutional. The circuit court interpreted the law based on the language in the statute. It did not address the constitutionality of the statute.

At the hearing on Blackman's motion to suppress evidence, the parties discussed how the implied consent law works, and whether the provision at issue in this case, § 343.305(3)(a), is constitutional (36:18-34). Blackman is correct that the prosecutor did not argue about those issues in precisely the same manner the State is arguing those issues on appeal.

But a party is not required to make exactly the same argument on appeal that it made in the circuit court. In *State v. Piddington*, 2000 WI App 44, ¶ 8, 233 Wis. 2d 257, 607 N.W.2d 303, the State argued on appeal that to comply with the implied consent law, an officer need only read the Informing the Accused form to an arrested person. The defendant argued that the State could not make this argument, because it had not made the argument in the circuit court. *Id.*

This court rejected the defendant's argument, concluding that "the State preserved its right to make its present argument by making known in the trial court its position that the arresting officer's actions after he arrested Piddington complied with the statutory requirement to 'inform the accused.'" *Id.* ¶ 10 (citation omitted). The court added that "[t]he argument the State now makes is at most a refinement of the argument it presented in the trial court. The State neither raises a new issue nor advances a theory different than one it presented in the trial court." *Id.*

The same is true in this case. The circuit court obviously understood that the State was arguing that the blood draw in this case was authorized by the implied consent law, and was constitutional. The court addressed precisely those issues at the hearing (36:34-36), and in its decision (23:1-5). The circuit court will not be blindsided by the State's refined arguments on appeal.

In addition, the issues in this case—the proper interpretation of the implied consent law and the constitutionality of the law—are questions of law, reviewed by this court de novo. *State v. Padley*, 2014 WI App 65, 354 Wis. 2d 545, 849 N.W.2d 867 ¶¶16-17 (citations omitted). And as Blackman acknowledges, in determining the constitutionality of a statute, a reviewing court presumes the statute is constitutional and "must indulge every presumption to sustain the law" (Blackman's Br. at 13) (citing *State v. Randall*, 192 Wis. 2d 800, 824, 532 N.W.2d 84 (1995)). If this court were to consider only the precise

argument the prosecutor made in the circuit court, and not the refinement of that argument, it could not properly assess the constitutionality of the statute. For all of these reasons, this court should consider the State's arguments in deciding this appeal.

C. Blackman was not unconstitutionally coerced into submitting to the officer's request for a blood draw.

In his brief on appeal, Blackman argues that he was "unconstitutionally coerced into taking the blood test" (Blackman's Br. at 13). However, as the State explained in its initial brief, coercion requires police misconduct, undue pressure, or duress (State's Br. at 7-8). Blackman does not dispute that in this case there was no officer misconduct, undue pressure, or duress. He therefore has not shown coercion.

D. The officer in this case properly informed Blackman that if he refused chemical testing, his operating privilege would be revoked.

In its initial brief, the State explained the operation of the implied consent law when an officer requests a blood sample from a person under Wis. Stat. § 343.305(3)(ar)2. The officer can request a sample based on probable cause to believe the person operated a vehicle that was involved in an accident that causes death or great bodily harm, and reason to believe the person violated a state or local traffic law (State's Br. at 8-15). If the person refuses, the officer places the person under arrest and again requests a sample. If the person refuses that request, the person's operating privilege is revoked (State's Br. at 11-12).

Blackman points out that the Informing the Accused form says that a person's operating privilege will be revoked rather than saying that the person will be arrested and if he or she refuses again, his or her operating privilege will be revoked (Blackman's Br. at 17-18). But he acknowledges

that the circuit court recognized that the form is not misleading because there is a potential for revocation, and he does not argue the circuit court was incorrect (23:3; Blackman's Br. at 18).

Blackman argues that the circuit court understood that if he had continued refusing, his operating privilege would be revoked, but that it concluded that his revocation would be reversed under Section 343.305(9), at a refusal hearing (Blackman's Br. at 21).

The State acknowledges that the circuit court understood the procedure followed when a person refuses under § 343.305(3)(ar)2. However, the court was incorrect when it concluded that if Blackman had refused, the resulting revocation would necessarily have been reversed.

As the State explained, a court can hold a refusal hearing only if the person timely requests a hearing. The court can rescind the revocation only if the person prevails at the hearing. If the person does not timely request a refusal hearing, the revocation is enforced. The circuit court has no authority to hold a hearing, and must enforce the revocation (State's Br. at 12-14) (citing *Village of Elm Grove v. Brefka*, 2013 WI 54, ¶ 39, 348 Wis. 2d 282, 832 N.W.2d 121).

Blackman asserts that "[i]n 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" (Blackman's Br. at 21).

But Blackman does not address *Brefka* or argue that it is somehow inapplicable. Under *Brefka*, the circuit court's conclusion that a revocation under § 343.305(3)(ar)2 is necessarily statutorily unenforceable is simply wrong.

Blackman argues that the circuit court's conclusion that his submission to a blood draw was coerced "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" (Blackman's Br. at 21).

But the circuit court did not conclude that it would have been unfair or coercive for the officer to read the form to Blackman without probable cause to believe Blackman was impaired, if a revocation for refusal could have been enforced. The court's rationale was simply that a revocation under § 343.305(3)(ar)2 cannot be enforced, so telling a person a refusal will result in revocation is coercive (23:4-5). However, a revocation will be enforced if the person does not timely request a refusal hearing, and as the State explained in its initial brief, a revocation under § 343.305(3)(ar)2 may be enforced even if the person does timely request a hearing (State's Br. at 8-15).

An officer may proceed under § 343.305(3)(ar) even if the officer has probable cause to believe that the person committed an OWI-related offense such that the officer could proceed under § 343.305(3)(a). 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) (State's Br. at 16-17).

Even if the officer does not initially have probable cause to arrest for OWI, a refusal, along with the other circumstances, could be sufficient for probable cause. Alternatively, the refusal might give the officer probable cause to request a preliminary breath test (PBT), or field sobriety tests, and the results of a PBT and field tests—or the refusal to perform them— may give the officer probable cause to arrest for an OWI-related offense (State's Br. at 16-18).

Blackman does not dispute that under any of these circumstances, a revocation under § 343.305(3)(ar)2 can be enforceable.

In its initial brief the State asserted that the legislature did not intend that whether there was probable cause to arrest for OWI and whether the person was actually arrested for OWI be issues at hearings for refusals under § 343.305(3)(ar)2 (State's Br. at 18-26). In his brief, Blackman does not dispute the State's argument.

E. The officer did not coerce Blackman into submitting to a blood draw.

Blackman asserts that his submission to a blood draw was coerced because the officer told him that after a serious accident, the "normal procedure" was to take a blood sample, and the officer then transported him to the hospital (Blackman's Br. at 25-27). He argues that the officer indicted that he had "no choice" but to submit to a blood draw (Blackman's Br. at 26).

The circuit court correctly did not conclude that the officer's conduct or words in any way coerced Blackman. The officer transported Blackman to the hospital for a blood draw, but read the Informing the Accused form to him, specifically giving him the opportunity to withdraw the consent to a blood draw that he had already given (36:12-13); Wis. Stat. § 343.305(2) and (4). The officer did not require Blackman to submit to a blood draw, or indicate that Blackman had no choice but to submit to a blood draw. He therefore did not coerce Blackman into submitting.

F. Wisconsin Stat. § 343.305(3)(ar)2 is not unconstitutional.

Blackman argues that § 343.305(3)(ar)2 is unconstitutional (Blackman's Br. at 28-33). He acknowledges that the circuit court did not address his argument that § 343.305(3)(ar)2 is unconstitutional (23:5), but he asserts that the circuit court's conclusion that "the statutory scheme does not support a revocation that is threatened," means that the statute is unconstitutional on its face (Blackman's Br. at 28-29).

Blackman notes that in its brief the State pointed out drafting errors in § 343.305. He seems to assert that these drafting errors make the statute unconstitutional (Blackman's Br. at 29-30). But the drafting errors mean only that a person who refuses chemical testing might escape the penalties the legislature intended if he or she prevails at a timely-requested refusal hearing. That in some case the statute may not serve its intended purpose does not make it unconstitutional.

Blackman is incorrect in asserting that § 343.305(3)(ar)2 is unconstitutional on its face or as applied to him.

When a party raises a "facial challenge," the party "claim[s] that a statute is unconstitutional on its face—that is, that it always operates unconstitutionally." *State v. Smith*, 2010 WI 16, ¶ 10 n.9, 323 Wis. 2d 377, 780 N.W.2d 90 (quoting Black's Law Dictionary 223 (7th ed. 1999)).

However, as explained in the State's initial brief and in this brief, a revocation after a refusal under § 343.305(3)(ar) and then under § 343.305(3)(a), is enforced if the person does not timely request a refusal hearing, and may be enforced if the person does timely request a hearing. There are circumstances under which a revocation could be enforced, so the statute is not facially unconstitutional.

An "as-applied challenge" to a statute is a "claim that a statute is unconstitutional on the facts of a particular case or to a particular party." *Smith*, 323 Wis. 2d 377, ¶ 10 n.9, (quoting Black's Law Dictionary 223 (7th ed. 1999)).

Blackman argues that "the circuit court found that there was no probable cause to believe that Mr. Blackman was impaired," and that "he would never have been facing a revocation for refusing chemical testing" (Blackman's Br. at 31).

Again, if Blackman had refused the officer's request for a blood sample under § 343.305(3)(ar), the officer would have arrested him, and requested a blood sample under § 343.305(3)(a). If Blackman had refused again, his operating privilege would have been revoked. If he failed to request a refusal hearing within ten days, the revocation would have been enforced.

Blackman asserts that the officer had no probable cause upon which to arrest him for OWI, and therefore could not have arrested him and requested a test under § 343.305(3)(a) (Blackman's Br. at 32).

The circuit court did not conclude whether, had Blackman refused the request for a blood sample, the officer then would have had probable cause to arrest him for OWI, or probable cause to request a PBT or field sobriety tests, in an effort to establish probable cause to arrest him for OWI. The circuit court did not need to make these findings because Blackman submitted to the request for a blood sample.

And even if the officer would not have had probable cause to arrest for OWI, the statute explicitly provides that the officer would not have been authorized to arrest him after he refused a request for a blood draw under § 343.305(3)(ar), and then request a sample under § 343.305(3)(a) (State's Br. at 11).

Blackman also argues that "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" (Blackman's Br. at 33).

However, the officer accurately informed Blackman that if he refused, his operating privilege would be revoked. And the issue is not what Blackman would have done if he had refused and been arrested. Had he refused again, his

operating privilege would have been revoked. Had he submitted to a request for blood draw, he would be in the same position he is in now.

For these reasons, Blackman has failed to show that § 343.305(3)(ar)2 is unconstitutional, either facially, or as applied to him.

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 3rd day of February, 2016

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 2,939 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 3rd day of February, 2016.

_____
Michael C. Sanders
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