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STATE OF WISCONSIN
IN SUPREME COURT

Appellate Case No. 2015 AP 450-CR
(Fond du Lac County Case No. 13 CF 659)

STATE OF WISCONSIN,

Plaintiff-Appellant,

-vs-

ADAM M. BLACKMAN,

Defendant-Respondent-Petitioner.

REPLY BRIEF DEFENDANT-RESPONDENT-PETITIONER

On Appeal from an Order to Suppress Entered in Fond du Lac County Circuit Court, The Honorable Gary Sharpe, Presiding

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Respectfully Submitted:

Lubar & Lanning, LLC
7670 N. Port Washington Rd, Suite 105
Milwaukee, WI 53217
Telephone: (262) 334-9900

By: ***Chad A. Lanning***
State Bar No. 1027573

Melowski & Associates, LLC
524 South Pier Drive
Sheboygan, WI 53081
Telephone: (920) 208-3800
Facsimile: (920) 395-2443

By: ***Dennis M. Melowski***
State Bar No. 1021187
Attorneys for Defendant-Respondent-Petitioner

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ARGUMENT

I. THE IMPLIED CONSENT LAW UNCONSTITUTIONALLY COERCES CONSENT.

Blackman has asserted the implied consent law is broken because drivers in his position are told they face a revocation and other penalties if they refuse a suspicionless and warrantless blood test, when in fact, they are only facing a possible arrest. (R36 at 27.) Moreover, if there is no probable cause to arrest for an OWI-related offense, such drivers are not subject to penalties. (R36 at 27.)

A. Voluntary Consent.

For consent to justify the warrantless search in this case, the State must prove by clear and convincing evidence that Blackman consented "in fact" and that the consent was "voluntary." *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973).

Fourth Amendment consent must be "'an essentially free and unconstrained choice' not 'the product of duress or

coercion, express or implied.'" *State v. Artic*, 2010 WI 83, ¶32.

B. The ITAF was Incorrect.

Importantly the State agreed that an officer "cannot issue a notice of intent to revoke after a refusal under Section 343.305(3)(ar)." (State's br. at 20.)

Yet Blackman was asked to submit to a test under Section 343.305(3)(ar) and was read the Informing the Accused form ("ITAF") which told him:

> If you refuse… your operating privilege will be revoked and you will be subject to other penalties.

Section 343.305(4)*;* (R36 at 7,12-13.)

Thus, Blackman was misinformed by the ITAF.

Subsequently, the circuit court granted Blackman's motion to suppress and acknowledged the problem with the ITAF, but believed there was "potential" for a revocation. (R23 at 3.) Accordingly, the circuit court continued its voluntariness analysis to include what would happen at a hypothetical refusal hearing.

The circuit court concluded that Blackman would win because "there was no probable cause to believe impairment existed… at the time of driving." (R23 at 4.)(courts are required to find probable cause that an operator was under the influence); Section 343.305(9)(a)(5)(a).

Thus, the circuit court determined Blackman was unconstitutionally coerced by "the statutory scheme" which does not support the threatened revocation contained in the ITAF. (R23 at 5.)

The circuit court was correct, but not just because Blackman would have won a refusal hearing, but because the lack of probable cause meant that he would never have faced a refusal hearing at all.

In other words, the threatened revocation Blackman was told he was facing was not "potentially" or "technically" true".[1] *State v. Blackman*, 2016 WI App 69, ¶16 (Hagedorn, J.,

1 The Court of Appeals mistakenly said "if a driver refuses to take a test [requested under Section 343.305(3)(ar)2], his or her license is statutorily revoked. Sec. 343.305(9)(a)." *Blackman*, 2016 WI App at ¶4.

concurring)(the majority explains how the ITAF is "technically correct.")

C. The ITAF was not "Technically" Correct.

Sections 343.305(3)(ar)(1) & (2), state:

> If a person refuses to take a test under this subdivision, he or she may be arrested under par. (a).

Id.

Importantly, the circuit court asked:

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

(R36 at 28.).

Critically, the State has never answered this question. Rather, the State's arguments to the circuit court were limited to:

(1) The ITAF is a reasonable form of coercion, (R36 at 20-22)(citing *Wintlend*, and *Padley*); and

(2) The officer was acting according to "standard operating procedure," and thus, in good faith. (R36 at 22-23.)[2]

2 Blackman objects to all new arguments made by the State for the first time on appeal. *State v. Rodgers*, 196 Wis. 2d 817, 827, 539 N.W.2d 897 (Ct. App. 1995)(appellate courts, "will not… blindside trial courts

The circuit court held that had Blackman refused the Section 343.305(3)(ar)(2) test, the officer could have only arrested Blackman for impaired driving. (R23 at 3.)

The circuit court's holding is further confirmed when examining the legislative history.

In 2005, the Legislature enacted 2005 Wis. Act 413, which created Section 343.305(3)(ar). The newly created Section 343.305(3)(ar) authorized law enforcement to request warrantless tests from drivers involved in accidents involving death or great bodily harm – even though the driver was not under arrest for an OWI-related offense – where the officer "detected any presence of alcohol."

A Legislative Council Amendment Memo confirms the Legislature wanted people refusing Section 343.305(3)(ar) tests to face the potential of being arrested for OWI. Specifically, the memo explained:

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with reversals based on theories which did not originate in their forum.").

> If the person refuses, he or she may be arrested for operating while intoxicated (OWI).

Wisconsin Legislative Council Amendment Memo for AA 1 to 2005 SB 611, April 27, 2006. (*See* State's Supplemental Appendix, R-App. 102.)

Admittedly, the Legislature may have believed that in cases where there was a serious accident, and the presence of alcohol, there would be other sufficient facts ensuring that law enforcement would have probable cause to arrest for an OWI-related offense.

Subsequently, the Legislature modified Section 343.305(3)(ar) with 2009 Wis. Act 163. This change meant that a driver need not be arrested for an OWI-related offense or suspected of one for the new statute to apply. *Blackman*, 2016 WI App at ¶4 n.2.

2009 Wis. Act 163 did not, however, amend the language stating that "[i]f a person refuses to take a test under this subdivision, he or she may be arrested…." *See* Section 343.305(3)(ar)(1) & (2). Moreover, Blackman could not find anything in the legislative history of 2009 Wis. Act 163 to

suggest that the legislature indented to change the previously stated intent that a driver refusing a test "may be arrested for" OWI.

Critically, nothing in the statute says that refusing a Section 343.305(3)(ar) test leads to an automatic arrest, and the State has not argued otherwise. In fact, the State explicitly argued to the contrary:

> there is nothing in either of these subsections which suggests that anyone can be 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*, Case No. 2013 AP 852-CR); (Blackman's br. App. E).

The State has failed to articulate any constitutionally adequate probable cause which would lead one to believe that Blackman had committed an offense involving impaired driving.

Rather, the State has asserted "[i]f Blackman had refused, the officer would have arrested him and requested a sample under Wis. Stat. § 303.305(3)(a)." (State's br. at 7.). Similarly, the State claimed—without any explanation,

discussion, citation to authority or the record—that, "Deputy Abler was going to arrest [Blackman] if he refused."[3] (State's br. at 20.); *Barakat v. DHSS*, 191 Wis. 2d 769, 786, (Ct. App. 1995) (insufficiently developed arguments, lacking citation to authority need not be considered).

Importantly, if simply refusing a suspicionless and warrantless blood test requested under Section 343.305(3)(ar) – resulted in an arrest for a criminal charge – such an arrest would violate *Birchfield*.

The *Birchfield* court concluded that states may not impose criminal penalties for a refusal to submit to a

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3 On appeal, the State complained for the first time, "it is unclear whether Deputy Abler would have had probable cause to arrest Blackman for an OWI-related offense" if he refused. (State's br. at 30 n.6)

The State, however, never challenged the circuit court's finding that there was no probable cause to arrest for an OWI-related offense. (R23 at 4.) Presumably the State did not do so because such probable cause did not exist.

Lastly, it is the State's burden to prove consent was voluntary by clear and convincing evidence. *Artic*, 2010 WI at ¶32. The State's failure to obtain evidence, present evidence or present arguments below cannot possible bolster its arguments with this Court.

warrantless blood draw. *Birchfield*, 136 S. Ct. at 2166. Accordingly, the State cannot be prohibited from charging a driver with a criminal refusal for refusing a warrantless blood test, but allow that driver to be charged with a criminal OWI – causing injury for that same refusal.

In summary, Blackman was asked to submit to a suspicionless and warrantless blood test pursuant to Section 343.305(3)(ar). Blackman was misinformed by the ITAF because it threatened him with a revocation, when he was only facing a possible arrest for an OWI-related offense.

Furthermore, Blackman would never have been arrested for an OWI-related offense because there was no probable cause to believe that impairment existed. (R23 at 4.) Accordingly, Blackman could not have been asked a second time to submit to a blood test under Section 343.305(3)(a) – where a second refusal would have led to the issuance of a notice of intent to revoke. Section 343.305(9)(a).

Therefore, when Blackman was asked to submit to the blood test under Section 343.305(3)(ar), he was not "potentially" or "technically" facing a possible revocation or other penalties. Rather, the ITAF misinformed Blackman of the consequences he faced if he refused the test. *See* (Blackman's br. at 25-27.)(the ITAF does not accurately inform drivers of their precise legal situation").

The State's argument that "Blackman was correctly advised of the mechanisms of the statute and the consequences for refusal" is not supported by the facts or the law. (State's br. at 7, 18.)

Constitutionally valid consent should not be found when the decision to consent was based on a misstatement of the consequences the person faced if they refused.[4]

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4 This Court should reject the State's argument – made for the first time on appeal - that Section 343.305(9)(a)(5) "can reasonably be interpreted as limiting the issues that may be raised at a refusal hearing, but not requiring that each issue be addressed at every refusal hearing." (State's br. at 23.); *See Rodgers*, 196 Wis. 2d at 828-29.

The State's legal authority for this new interpretation is the American Heritage Dictionary. There is a presumption, however, against

II. UNDER THE TOTALITY OF THE CIRCUMSTANCES, BLACKMAN'S CONSENT WAS COERCED.

The State says "voluntariness of consent must be determined on the totality of the circumstances," but its brief appears to argue the opposite.[5] (State's br. at 30.).

The State has failed to distinguish between "consent in fact" and "consent which is given freely and voluntarily." *See Artic*, 2010 WI at ¶30(two issues exist (1) whether consent was given in fact; and (2) whether the consent was given was voluntary.)

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creating an exception in a statute that has none. *See City of Chicago v. Environmental Defense Fund*, 114 S. Ct. 1588, 1593 (1994). Moreover, Blackman was not facing a revocation.

Importantly, requiring probable cause to arrest on an OWI-related offense does not run contrary to the intent of the implied consent law. This Court held the intent is, "to obtain the blood-alcohol content in order to obtain evidence to prosecute drunk drivers." *State v. Brooks*, 113 Wis. 2d 347, 355 (1983). Thus, revoking the license of an individual not suspected of OWI – is contrary to the law's intent.

5 The State says "drivers in Wisconsin give consent to a request for a sample for chemical testing… long before a law enforcement officer requests a sample." (State's br. at 11,12,15,23,31.)

Apparently, the State wants this Court to overrule parts of *Padley* regarding when consent occurs.[6] (State's br. at 12-16.) If this is the case, the State does not explain what time frame courts are to consider when looking at the "totality of the circumstances."

Ultimately, the State's arguments do not meet its burden to prove by clear and convincing evidence that Blackman's consent was the result of a free unconstrained choice.

Specifically, the State argued:[7]

(1) Blackman consented by operating on a highway.[8]

The State appears to be saying Blackman impliedly consented. This allegation has limited benefit because the

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6 Ironically, the State approvingly cited the *Padley* decision to the circuit court. (R36 at 20-22.)

7 (State's br. at 31.)

8 If the State is arguing that Blackman's consent was complete and irrevocable once he began driving, then Blackman would argue his consent was unconstitutional for that reason alone. *See Brars v. State*, 336 P. 3d 939, 945 (Nev. 2014)(a "necessary element of consent is the ability to limit or revoke it")

State never developed a record on this issue before the circuit court. Further, the State does not articulate how implied consent should impact this court's decision regarding the voluntariness of Blackman's consent.[9]

> (2) The officer had lawful authority to request blood, and if Blackman refused, he was subject to a revocation.

As discussed above, Blackman was not subject to a revocation. Moreover, this factor appears to be a restatement of the State's first factor. This factor does not weigh in favor of finding Blackman's consent voluntary.

> (3) When the officer told Blackman that "department policy is to take blood when there is a serious accident, the officer merely clarified that the policy is to request or require a blood sample, rather than a breath or urine sample even if the person refuses the officer's request for a sample."

The State fails to make any citation to the record for this allegation. *Nelson v. Schreiner*, 161 Wis. 2d 798, 804, 469

9 The State told the circuit court that the ITAF is "a reasonable form of coercion." (R36 at 20)

N.W.2d 214 (Ct. App. 1991)(assertions of fact that are not part of the record will not be considered). The officer testified:

> I explained our normal procedure is when there is a serious accident like this that we do take blood samples.

(R36 at 16.)

The officer's statement "we do take blood" is exactly what the implied consent law does not authorize. *Padley*, 2014 WI App at ¶33 (the statute does not authorize police "to take an evidentiary blood sample").

The officer's testimony weighs in favor of Blackman's consent being found involuntary.

> (4) The officer read the ITAF giving Blackman the choice of (1) affirming the consent he gave by driving; or (2) exercising his statuary opportunity to withdrew that consent, by refusing.

Admittedly, Blackman was read the ITAF, but he was not provided with the State's explanation of it. Further, the State does not explain how it's interpretation impacts this Court's determination on whether Blackman's consent was voluntary.

To the contrary, the misleading ITAF, plus the totality of circumstances facing Blackman – lead to a finding that his consent was not constitutionally valid. (Blackman's br. at 36-41.)

Again, the State failed to meet its burden to prove that Blackman's consent was voluntary under the totality of the circumstances.[10]

III. WISCONSIN'S IMPLIED CONSENT LAW IS UNCONSTITUTIONAL ON ITS FACE AND AS-APPLIED TO BLACKMAN.

The State's makes two objections to Blackman's arguments that the implied consent law is unconstitutional.

First, the State claims it found a way "the statutory scheme can be enforceable." (State's br. at 32.) To the contrary, Blackman, and all similar drivers, would never face a revocation. As discussed, if the officer does not have probable cause to arrest for an OWI-related offense, the

10 Rather, the State mistakenly implied Blackman had the burden to prove his consent involuntary. (State's br. at 32.)(he "has pointed to nothing that renders that consent involuntary.")

implied consent law does not allow the officer to request a test – that if refused – would lead the officer issuing a notice of intent to revoke.[11] Accordingly, the ITAF always misinforms them.

Second, the State claims Blackman has misplaced reliance in *Birchfield*. (State's br. at 34-35.) To the contrary, *Birchfield* placed limits on the reach of implied consent laws.

Assuming *arguendo*, that Blackman was somehow "correctly informed" or the implied consent law somehow justified the revocation he was threatened with in the ITAF – this court should find that Wisconsin drivers should not be punished for exercising their constitutional right to be free from unreasonable searches and seizures. Especially in cases where there is no reason to suspect impaired driving. The State has not refuted this argument and it should be deemed

11 The State suggested fact patterns where the officer obtained probable cause to arrest for an OWI-related offense. Those chemical test requests would be made under Section 343.305(3)(a) – not Section 343.305(3)(ar). (State's br. at 27-30.)

conceded. *Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp*., 90 Wis. 2d 97, 109 (Ct. App. 1979).

Importantly, finding Section 343.305(3)(ar)2 unconstitutional will not stop the State from obtaining evidence of impaired driving. Further, when no such evidence is available – innocent drivers should not risk being convicted of refusing, and wrongly being branded a drunk driver.

IV. THE OFFICER DID NOT ACT IN GOOD FAITH RELIANCE ON "WELL SETTLED" PRECEDENT AND THE OFFICER ERRED INDEPENDENTLY OF THE IMPLIED CONSENT STATUTE.

The good faith exception to the exclusionary rule is only available when an officer reasonably relies on clear and settled precedent. *State v. Dearbourn*, 2010 WI 84, ¶46. In this case, the officer did not rely on well settled president.

Rather, the officer testified "it has become 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.) Further, the officer testified that he told Blackman "we do take blood" in serious accidents. (R36 at 16.)

Thus, the officer indicated he relied on departmental procedures, not well settled precedent. In fact, no statute or case would have permitted the officer to "take blood." Accordingly, one cannot claim the error in this case is strictly a legislative one.

Moreover, the officer could not have reasonably relied on the implied consent statute because the ITAF is clearly inconsistent on its face.[12] Importantly, the circuit court's ruling was not based on a new interpretation of a case, but rather, by reading the statute and seeing that it did not correctly inform Blackman of the consequences he was facing.

12 I have found no cases in my research where the good faith exception to the exclusionary rule was applied to a situation where an officer was facing contradictory statues with no clarifying case law.

Accordingly, the good faith exception to the exclusionary rule is not appropriate. Law enforcement should be deterred from developing policies of "taking blood."

CONCLUSION

For the reasons set forth above, Blackman respectfully requests this Court reverse the Court of Appeals' decision, and remand this matter to the circuit court for further proceedings consistent with this Court's decision.

Dated this _____ day of April, 2017.

Respectfully submitted,

MELOWSKI & ASSOCIATES, LLC

By: _____
Dennis M. Melowski
State Bar No. 1021187

LUBAR & LANNING, LLC

By: _____
Chad A. Lanning
State Bar No. 1027573
Attorneys for Defendant-Respondent-Petitioner

STATE OF WISCONSIN
IN SUPREME COURT

CERTIFICATION

I hereby certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is proportional serif font. The text is 13-point type and the length of the brief is 2,989 words.

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

(1) a table of contents;
(2) relevant trial court record entries;
(3) the findings or opinion of the trial court; and
(4) 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 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 I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Rule 809.12.

I further certify that the 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 5th day of April, 2017.

Respectfully submitted:
By:_____
Chad A. Lanning, State Bar No. 1027573
Attorney for Defendant-Respondent-Petitioner