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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 15 AP 1261 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

NAVDEEP S. BRAR,

Defendant-Appellant

REPLY BRIEF OF DEFENDANT-APPELLANT

ON APPEAL FROM A FINAL ORDER ENTERED ON
APRIL 3, 2015 IN THE CIRCUIT COURT
FOR DANE COUNTY, BRANCH I,
THE HONORABLE JOHN W. MARKSON PRESIDING.

Respectfully submitted,

NAVDEEP S. BRAR,
Defendant-Appellant

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ARGUMENT

Respondent asks this Court to cover its ears and ignore both (1) the *other* words Brar uttered, as well as (2) the context in which they can be most fairly understood. Respondent ignores the lack of any pause between "of course" and the rest of the sentence, Brar's follow-up questions, Brar's vocal inflection, and the fact that English is not Brar's first language. Thus, more care need be taken to ensure his rights are protected. See: ***State v. Begicevic***, 2004 WI App 57, 678 N.W.2d 293. Respondent ignores the totality of the circumstances, choosing instead to double down on just one circumstance, which it has cherry-picked from the relevant totality.

This Court should reject Respondent's disingenuous argument for several reasons. First, Brar used the words "of course" only as a small and rhetorical part of a longer statement; thus, those words, if this Court agrees they were said, do not indicate consent. Importantly, the court's own reporter did not hear the words "of course." Nor did a separate court reporter who prepared a transcript of the audio at the request of the defense.[1] Officer Wood's assertion

[1] The trial court reporter reported the entire audio of the exchange between Brar and the officer as "unintelligible to reporter, unable to make record." 42:12-15.

The private court reporter reported the exchange as follows:

that he did not need a warrant to take Brar's blood vitiated the voluntariness of any consent.

I. If the words "of course" were used, those words do not establish consent.

> OFFICER WOOD: Will you submit to an evidentiary chemical test of your blood?
> MR. BRAR: (inaudible) testing.
> OFFICER WOOD: It's yes or not?
> MR. BRAR: No, it's (inaudible).
> OFFICER WOOD: It is. It's – the question in front of you is this, will you submit –
> MR. BRAR: No, I (inaudible) listening. I don't know the law. I don't know the law. No more elaborate. Tell me it's a violation.
> OFFICER WOOD: If you refuse to take any test that this agency requests, your operating privilege will be revoked and you'll be subject to other penalties. Will you take the test, yes or no, please?
> MR. BRAR: So I have no other option (inaudible).
> OFFICER WOOD: The situation is up to you.
> MR. BRAR: No, I'm asking you.
> OFFICER WOOD: I told you, the choice is up to you.
> MR. BRAR: Nobody read me these questions before in my life.
> OFFICER WOOD: Will you submit to the test, yes or no, please?
> MR. BRAR: (Inaudible) want my like (inaudible). Why read a complicated question? What kind of test you are going to do?
> OFFICER WOOD: A test of your blood.
> MR. BRAR: Why do you have to take a warrant for that, don't you?
> OFFICER WOOD: Take what, I'm sorry?
> MR. BRAR: A warrant.
> OFFICER WOOD: A warrant?
> MR. BRAR: Yeah. You need a warrant for that (inaudible). Without that (inaudible) offending, I don't know. (Inaudible) you know it. (Inaudible) challenging you.
> (Pause)
> MR. BRAR: May I? Talk to my lawyer. 26:8-10.

The Supreme Court has set forth an objective test for determining whether a person has consented to a Fourth Amendment search. ***Florida v. Jimeno***, 500 U.S. 248, 251 (1991). That is: "[W]hat would the typical reasonable person have understood by the exchange between the officer and the suspect?" ***Jimeno***, 500 U.S. at 251. Again, this test embraces the totality of the circumstances – not just the one that is favorable to the government. ***State v. Padley***, 2014 WI App 65, ¶ 64, 354 Wis. 2d 545, 849 N.W.2d 867. Here, a reasonable bystander would understand that Brar had not consented at the time he allegedly said the words "of course." Brar had questions about the type of test requested of him. He had questions about whether the officer would need a warrant. Where a person continues to have questions, the deal is not done.

Plain meaning analysis relates to statutory interpretation, rather than to constitutional frameworks. ***State ex rel. Kalal v. Circuit Court for Dane Cnty.***, 271 Wis. 2d 633, 668, 681 N.W.2d 110 (2004). Courts frequently consult dictionary definitions when performing plain meaning analyses. ***Kalal***, 271 Wis. 2d at 668 (concluding that one word "has a common and accepted meaning, ascertainable by reference to the dictionary definition."). However, the State offers a dictionary definition of the word "consent" as if it

aids this Court's *constitutional* consent analysis. (Resp't's Br. at 3.) This approach is found nowhere in the case law of any jurisdiction. The relevant meaning of consent is to be found in cases as noted in Brar's original brief which analyze issues of constitutional consent. Thus, this Court should disregard that aspect of the State's argument; it lends no assistance to the task at hand.[2]

Brar allegedly said "of course" and then unintelligible words followed without any pause after the words "of course." (25:2.) Respondent mischaracterizes this by arguing that Brar "said 'of course,' and then a statement similar to 'he didn't want to have his license revoked.'" (Resp't's Br. at 4.) Respondent expediently attempts to make Brar's response into *two* statements, rather than one. (*Id.*) Of course Respondent would attempt to do that. Had Brar simply said "Of course," left it at that, and then made a *second and separate* statement about his license, he would have provided the affirmative reply that he did *not* provide in this case.

Standing alone, "Of course" is an affirmative response. Of course, Brar never used the words "of course" standing alone. He followed them with more words. The officer admitted that he could

[2] Respondent argued in the court below that Brar consented to the blood test simply by "getting his license." (42:35) The State properly abandons this argument on appeal.

not really hear anything about a license being revoked after those words on cross-examination. 42:18-19. The officer testified:

"I thought I heard him say, "of course," and then I don't want, and he mumbles, and then he trails off." 42:18-19.

Thus, the officer clarified that Brar never said "of course, I don't want to lose my license". What he said, according to the officer, was "of course I don't want". That is more accurately described as a declination of the test. Any factual finding by the trial court to the contrary was clearly erroneous. Even if the version the officer testified to on direct was accurate, the subsequent words objectively and unmistakably altered the meaning of the antecedent "of course." One dictionary provides five distinct uses or meanings for the phrase "of course." Each conveys something different from the other.[3]

1. Used for saying "yes" very definitely, in answer to a question.
   "Do you know what I mean?" "Of course."

2. Used for giving someone permission in a police way.
   "May I come in?" "Of course you may."

3. Used for agreeing or disagreeing with someone.
   "They won't mind if we're a bit late." "Of course they will."

[3] Respondent's use of a dictionary to define the legal standard of "consent" was not instructive because consent is a legal conclusion, not a factual one. These dictionary entries *are* instructive because they illustrate the different meanings of Brar's purported factual use of the phrase "of course."

4. Used for saying something that you think someone probably already knows or will not be surprised about.
   "I will, of course, make sure you're all kept fully informed."
   "He found out in the end, of course."

5. Used when you have just realized something.
   "Of course! Now I understand."

(http://www.macmillandictionary.com/us/dictionary/american/of-course) (Dec. 13, 2015) (numeration altered). Respondent argues that this case falls under examples one (1) and two (2). Appellant argues that this case is most like example four (4). Even if Brar said something about not wanting to lose his license, that changes nothing in the consent analysis. No one wants to lose his or her license. Officer Wood presented Brar with a difficult choice, and Brar merely thought aloud about his options.

Wisconsin case law is replete with factual scenarios where a law enforcement officer reads the informing the accused form ("ITAF") and is met by a confused driver with questions – and not by a simple "yes" or "no" response. *See, e.g.*, ***State v. Baratka***, 258 Wis. 2d 342, 654 N.W.2d 875 (Ct. App. 2002) (analyzing a situation where a driver responded to the ITAF by saying "that he did not understand and requested an attorney."); ***State v. Quelle***, 198 Wis. 2d 269, 542 N.W.2d 196 (Ct. App. 2008) (involving an officer who read the ITAF, where the driver "also read each paragraph to herself and

questioned the officer about each paragraph. At various points, the officer attempted to explain the paragraphs to her and, after roughly forty-five minutes of questions and answers, Quelle agreed to take the test."), *abrogated in part by* ***In re Smith***, 308 Wis. 2d 65, 746 N.W.2d 243 (2008).

Brar, like the drivers in the above cases, asked follow up questions. He asked what type of test Officer Wood wanted to perform. Apparently surprised when Officer Wood requested a blood test, Brar clarified whether Officer Wood felt he needed a warrant for that. He not only asked once as the officer testified to; he asked three times. (26.) The matter was unsettled for Brar, and it would be unsettled for the reasonable bystander. Officer Wood was either subjectively satisfied or too impatient to explore the matter further. Accordingly, he printed an informing the accused form ("ITAF") reflecting the affirmative response that Brar never provided. (25:1.) The form indicates that Brar said "yes." (*Id.*) Of course, that is not the case.

Cases from the Supreme Courts of the United States and Wisconsin are consistent in holding the State's burden of proving consent by clear and convincing evidence "cannot be discharged by showing no more than acquiescence to a claim of lawful authority."

Bumper v. North Carolina, 391 U.S. 543, 549 (1968); ***State v. Johnson***, 299 Wis. 2d 675, 687–88, 729 N.W.2d 182 (2007) (concluding that the defendant "merely acquiesced to the search" where the defendant indicated "that he wasn't going to do anything to stop" the police from searching). Apparently unaware of this line of cases, Respondent points to Brar's "sufficient opportunity to change his mind and voice opposition to a blood draw." (Resp't's Br. at 5.) The failure to address these cases should be deemed a concession that the defense argument is correct. ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). Brar need not revoke consent that he never provided. He need not physically resist. He was under arrest and had been told a warrant was unnecessary. Respondent argues the lack of active protestation, but the law requires no such thing. Regardless, Brar *did* challenge the officer's authority to perform the blood draw by demanding to know whether Officer Wood required a warrant for the intrusion. Interestingly, it wasn't until Brar mentioned a warrant, that the officer wrote "Yes" that Brar would submit to the blood test. 42:18.

Respondent asks this Court to defer to Officer Wood because he "was in the best position to determine what Brar said on the night

of the incident." (Resp't's Br. at 10.) While that is often true, the officer's testimony at the motion hearing provided negligible information this Court would be unable to discern from listening to the recordings. He spent much of the motion hearing testifying to the recording's contents, rather than to his own natural recollection. (42:4–24.) The recording sufficiently reflects Officer Wood's reading of the ITAF. (25:2; 26:2.) The recording clearly reflects Officer Wood's request for an evidentiary chemical test. (*Id.*) The recording clearly reflects that Brar *never* used the words "of course" in isolation. (*Id.*) It is questionable whether those words were actually used at all. That is an issue for this Court to decide upon listening to the audio.

Even if this Court credits Officer Wood's testimony entirely, then only the following is known: (1) Brar may have said "Of course I don't want my license to be revoked"; (2) he continued asking questions; (3) at the time he said "of course I don't want my license to be revoked," he did not know whether he was being asked for a blood, breath, or urine test; (4) he then asked more than once whether Officer Wood needed a warrant to take his blood. These facts amount to confusion and show Brar's expectation of privacy.

This is to say nothing of the lower court's attempt to shield its ruling from appellate review by finding "as a matter of fact that Mr. Brar did give consent." (42:49.) The court again said, "I do respectfully make the finding of fact that there was actual consent." (42:50.) The lower court brought up the point a third time at plea and sentencing. (43:15.) "I was trying to make a reasoned determination of whether he consented or not. But once I had done that, that's a factual determination. It's a determination that the court of appeals needs to defer to. They cannot substitute their interpretation of the evidence for mine." (*Id.*) Of course, trial courts may find facts about what they believe was said; however, whether those statements amount to consent involves a conclusion of law, to which this Court need not defer. ***State v. Giebel***, 2006 WI App 239, ¶ 11, 297 Wis. 2d 446, 724 N.W.2d 402.

II. Officer Wood extracted Brar's acquiescence by a misleading indication no warrant was required.

This Court need not reach this second inquiry if it agrees Brar did not give full consent as argued above. ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (holding that where one issue is dispositive, appellate courts need not address remaining issues). However, should this Court reach this issue, it should resolve it in Brar's favor for two reasons. First, Respondent cites no law in

support of its desired result. Second, Brar acquiesced in the blood draw process because Officer Wood told him he did not need a warrant to take his blood.

Respondent cites no law in support of the second issue; that is, whether Brar provided voluntary consent despite the fact that Officer Wood told Brar that he needed no warrant. Respondent's brief therefore resembles the appellant's brief in ***State v. Boyer***, 198 Wis. 2d 837, 842 n.4, 543 N.W.2d 562 (Ct. App. 1995) (citing ***State v. Pettit***, 171 Wis. 2d 827, 646–47, 492 N.W.2d 633 (Ct. App. 1992) (arguments not supported by legal authority will not be considered). "This rule, though most commonly applied to defendant-appellants, may be applied with undiminished vigor when, as now, a prosecutor attempts to rely on fleeting references to unsubstantiated conclusions in lieu of structured argumentation." ***United States v. Rodriguez-Marrero***, 390 F.3d 1, 18 (1st Cir. 2004) (internal quotation omitted); *see also* ***State v. Ankler***, 2014 WI App 107, ¶ 13, 357 Wis. 2d 565, 855 N.W.2d 483 ("The State does not directly respond to [appellant's] argument, and therefore concedes the issue. We will not abandon our neutrality to develop arguments for the parties, so we take the State's failure to brief the issue as a tacit admission."). Furthermore, the State's failure to address cases cited by Brar in his

original brief as to mere acquiescence not being sufficient to establish consent such as ***Bumper, supra*** must be construed as a concession. See: ***Charolais, supra***.

However, addressing the merits of the issue, Officer Wood misled Brar by telling him he did not need a warrant to draw blood. Respondent gives Brar very little to which to reply, but seems simply to adopt the lower court's position that Officer Wood "did not need a warrant for that, because Brar had just consented." (42:49.) As stated above, Brar never consented to a blood test. However, even if he did, the lower court's narrow interpretation of the exchange is not a commonsense evaluation of the conversation. When the entire exchange is a series of questions and statements of confusion – the mention of the word "warrant" cannot be ignored. This is especially true when English is not Brar's first language, and nowhere in the record is there an offer by police to allow him to have access to an interpreter. Without an interpreter or a clear understanding of what Brar was saying by his repeated use of the word "warrant", the State failed to meet its burden of showing an exception to the warrant requirement.

Granted, it is true that warrants are not required where a person consents to a search. However, Officer Wood failed to

include that caveat in the ongoing conversation. Officer Wood's reply was misleading because it suggested that the warrant requirement is not implicated at all in a blood test. The answer vitiated the voluntariness of any consent. "It is well established that there can be no effective consent to a search or seizure if that consent follows a law enforcement officer's *assertion of an independent right to engage in such conduct*." ***Schneckloth v. Bustamonte***, 412 U.S. 218, 248 (1973) (emphasis added).

CONCLUSION

Brar never gave his consent to a blood test. Officer Wood plucked two words from the larger context of the conversation and repurposed them to fit the desired result. To call this consent would be unfair. *Cf.* ***Michigan v. Bryant***, 562 U.S. 344, 395 (2011) (Scalia, J., dissenting) ("For all I know, [the defendant] has received his just deserts. But he surely has not received them pursuant to the procedures that our Constitution requires. And what has been taken away from him has been taken away from us all."). Officer Wood misled Brar and vitiated any shadow of consent by informing him that a warrant was not required to take his blood. Thus, in both respects, the lower court erred in denying Brar's motion to suppress. The remaining evidence would have been insufficient to convict him.

Accordingly, Brar respectfully asks this Court to reverse and remand the matter with instructions to grant the suppression motion.

Dated at Madison, Wisconsin, December 22, 2015.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced using the following font:

Proportional serif font: Min. printing resolution of 200 dots per inch, 13-point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 2,994 words.

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Dated: December 22, 2015.

Signed,

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