STATE OF WISCONSIN

IN SUPREME COURT

No. 2015AP1261-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

NAVDEEP S. BRAR,

Defendant-Appellant-Petitioner.

ON APPEAL FROM A DECISION OF THE WISCONSIN COURT OF APPEALS AFFIRMING A JUDGMENT OF CONVICTION, ENTERED IN THE CIRCUIT COURT FOR DANE COUNTY, THE HONORABLE JOHN W. MARKSON PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

BRAD D. SCHIMEL
Wisconsin Attorney General

DAVID H. PERLMAN
Assistant Attorney General
State Bar #1002730

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1420
(608) 266-9594 (Fax)
perlmandh@doj.state.wi.us

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

By granting review, this Court has indicated that oral argument and publication are appropriate.

STATEMENT OF ISSUES

1. Did Brar consent to the blood test before arriving at the Middleton Police Department?

Neither the trial court nor the court of appeals specifically addressed this issue, but both courts ultimately determined that Brar consented to the test.

2. Did Brar submit to the blood test after being read the informing the accused form?

Both courts found that Brar consented to the test after being read the informing the accused form.[1]

3. Did the police mislead Brar into agreeing to take the test, by telling him that there was no need to get a search warrant for his blood?

Both courts answered no.

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[1] As will be argued below, Brar had already consented to the test and the issue was whether he would submit to the test or recant his earlier implied consent and face the ramifications of a refusal. So, the State submits that the trial court and court of appeals took a faulty tack but reached the right conclusion. This Court is not restrained to the lower court's reasoning in affirming or denying its order; instead it can affirm the order on different grounds. *State v. Smiter*, 2011 WI App 15, ¶ 9, 331 Wis. 2d 431, 793 N.W.2d 920.

STATEMENT OF CASE

On July 2, 2014, Brar was arrested by Middleton Police Officer, Michael Wood, for operating while intoxicated (OWI). (42:5.) Brar was charged in a criminal complaint with OWI third offense, contrary to Wis. Stat. § 346.63(1)(a), and operating a motor vehicle with a prohibited alcohol concentration, contrary to Wis. Stat § 346.63(1)(b). (4:1–2.)

Brar moved the court to suppress the results of his blood test, arguing that he did not consent to the test. (19:1–2.) The trial court initially denied the motion without a hearing. (41:2.) Brar moved the court to reconsider, and the trial court then agreed to an evidentiary hearing (41:8–9). On December 23, 2014, the parties appeared for an evidentiary hearing before the Honorable John W. Markson. (42:1.) The trial court, after hearing testimony, denied Brar's motion to suppress the blood evidence, finding that Brar consented to the blood test. (42:49–50.) Brar made a motion to reconsider to the trial court, and this motion was denied. (42:50.) On April 3, 2015, Brar entered a no contest plea and filed a Notice of Intent to pursue Post-Conviction Relief. (35:1; 34:2.) Judge Markson entered judgment of conviction and stayed penalties pending appeal. (43:17.) Brar then appealed, challenging the trial court's order denying his motion to suppress. (37.)

The Court of Appeals affirmed the trial court, finding that since Brar had consented to the blood test, no warrant was required. *State v. Brar*, No. 2015AP1261-CR, 2016 WL 3619367 (Wis. Ct. App. July 7, 2016) (unpublished). Brar then filed a petition for review to this Court, and this Court agreed to hear the case.

Statement of Facts

On July 2, 2014, at approximately 12:54 a.m., Officer Michael Wood, an eleven-year veteran with the Middleton Police Department, stopped Brar's vehicle. (42:4, 5.) Brar was ultimately arrested for OWI and taken to the Middleton Police Department, where Officer Wood read to him the Informing the Accused form (the Form). (42:5–6.) After being read the Form, and after asking some questions, lamenting his predicament and minimizing his culpability (25:2; 26:6-9), Brar responded in the affirmative by saying "of course" and making a statement about not wanting to have his license revoked (25:2; 42:7).[2] After this response, which Officer Wood took as an affirmative response, Brar asked Officer Wood what test would be involved and Wood told him it would be a blood test. (42:9.) Brar then asked Officer Wood if he needed a warrant for the blood test, and Wood shook his head no. (*Id.*)

From the time he assented to the test until the blood was drawn, Brar never hesitated or gave any resistance. (*Id.*) And at no time did Brar ever say that he would not agree to have his blood drawn. (*Id.*) Brar's blood was drawn and the results showed a blood alcohol level of .186. (4:2.)

SUMMARY OF ARGUMENT

This case involves both a conceptual and factual divide between the parties. As to the conceptual dispute, Brar analyzes the issue of his submission to the blood test within

[2] Ex. 25:2 is missing visual footage of "Brar" saying "of course" but the audio file of Brar saying "of course" is clearly heard. So, it is difficult to pinpoint where this moment occurs in the recording. By use of a stopwatch, Brar saying "of course" occurs approximately three minutes and sixteen seconds after 1:37:30 a.m., or approximately 1:40:46 a.m.

the rubric of Fourth Amendment consent jurisprudence. Towards that end, Brar claims, "At the outset, Appellant-Petitioner notes that this case has very little to do with the implied consent law." (Brar's Br. 17.) The State disagrees. This is decidedly an implied consent case, and the core issue is not whether Brar consented to the test under a Fourth Amendment analysis, as he had already consented when he chose to drive. The key issue is whether Brar submitted, or refused the test within the statutory context of Wis. Stat. § 343.305.

The factual dispute concerns what Brar said in response to being read the Form. The State's position is that Brar said "of course" and words akin to not wanting to lose his license, as Officer Wood testified. Brar's position is that he did not say "of course" and he further argues that the moment where he supposedly made this statement is inaudible in the tape. He supports his contention by pointing out that both the court transcription and his privately retained transcriber marked his comment as "inaudible." (Brar's Br. 19.) The State disagrees that the tape is inaudible because the words "of course" can be clearly heard in the recording. The trial court made a finding of fact that Brar said "of course," and the court of appeals affirmed this determination.

As will be argued below, Brar consented to the evidentiary chemical test when he applied for his license and when he decided to drive. After his arrest, Brar was advised that he could submit to the test, or refuse and be punished for that refusal. Ultimately Brar, both by word and conduct, submitted to the test.

ARGUMENT

I. Brar had already consented to the blood draw prior to entering the Middleton Police Station to be read the Informing the Accused form.

A. Applicable legal principles as to the implied consent statute.

The right to refuse to submit to chemical tests in the OWI context is a statutory privilege and not a constitutional right. *State v. Reitter*, 227 Wis. 2d 213, 239, 595 N.W.2d 646 (1999). A subject's right to refuse a blood-alcohol test is simply a matter of grace bestowed by the Legislature and not a constitutional right. *South Dakota v. Neville*, 459 U.S. 553, 565 (1983). There is no constitutional right to refuse a blood-alcohol test. *State v. Mallick*, 210 Wis. 2d 427, 433, 565 N.W.2d 245 (Ct. App. 1997). Wisconsin clearly does not recognize a driver's right to refuse consent; rather, the driver's choice is to in effect recant the consent he had previously given when he applied for his license or decided to drive. *State v. Albright*, 98 Wis. 2d 663, 671, 298 N.W.2d 196 (Ct. App. 1980); *State v. Wintlend*, 2002 WI App 314, ¶ 16, 258 Wis. 2d 875, 655 N.W.2d 745. A driver in Wisconsin has no right to refuse to take a chemical test; by implying consent the statute removes any right a driver has to refuse the test. *State v. Gibson*, 2001 WI App 71, ¶ 9, 242 Wis. 2d 267, 626 N.W.2d 73; *State v. Zielke*, 137 Wis. 2d 39, 48, 403 N.W.2d 427 (1987).

The Wisconsin Legislature enacted the implied consent statute to facilitate the collection of evidence and not to enhance the rights of alleged drunk drivers. *Reitter*, 227 Wis. 2d at 223–25. The implied consent law was designed to secure convictions, and thus the statute should be interpreted liberally to accomplish this purpose. *Id.*; *State v. Crandall*, 133 Wis. 2d 251, 258, 394 N.W.2d 905 (1986). The purpose of

the implied consent law is to combat drunk driving by making it easier to collect evidence against accused drivers. *State v. Piddington*, 2001 WI 24, ¶ 17, 241 Wis. 2d 754, 623 N.W.2d 528. The legislative purpose of the implied consent law is to obtain blood-alcohol content to secure convictions; to facilitate the identification of drunken drivers and their removal from the highways. *Village of Elm Grove v. Brefka*, 2013 WI 54, ¶¶ 30–31, 348 Wis. 2d 282, 832 N.W.2d 121.

B. The theory behind the implied consent law.

Wisconsin has long interpreted the implied consent statute as a tool for identifying drunk drivers and to facilitate their prosecutions. Accordingly, the statute is to be interpreted liberally to fulfill this purpose. The underpinning for the statute is that any person who "drives or operates a motor vehicle upon the public highways of this state . . . is deemed to have given consent to one or more tests of his or her breath, blood or urine." Wis. Stat. § 343.305(2).

While the statute suggests the consent occurs when a person decides to drive the car, Wisconsin case law has typically opined that the consent occurs when the subject applied for a driver's license. *See State v. Neitzel*, 95 Wis. 2d 191, 193, 289 N.W.2d 828 (1980); *Reitter*, 227 Wis. 2d at 225.[3] It does not really matter whether the implied consent occurs when the subject applies for his driver's license or when he decided to drive on the date he was arrested; either way, the driver consented before the Form phase of the investigation. The bargain had already been struck: a person enjoys the privilege of being allowed to drive in Wisconsin in exchange

[3] It makes sense to include the choice to drive as a moment of implied consent, to insure the statute's applicability to out-of-state drivers, and those drivers who never procured a driver's license.

for submitting to a chemical test, or refusing and being penalized for that refusal.

The subject's decision to place himself within the orbit of the implied consent statute is a voluntary choice. He can choose to get a license or not, to drive or not, and for whichever decision is made, the State will not impose a penalty. This consent is consistent with Fourth Amendment requirements, though the consent is implied and not expressed. So, at the time of the Form stage of the proceedings, the question is no longer whether the defendant is consenting to the test, but rather whether the subject will submit to the test he previously agreed to take, or recant his consent and face the adverse consequences of a refusal.

C. The informing-the-accused environment is not a level playing field, and nor is it intended to be.

Brar imports Fourth Amendment consent principles into the Form phase of the OWI investigation. Brar writes, "The Supreme Court has set forth an objective test for determining whether a person has consented to a Fourth Amendment search" (Brar's Br. 21), and he asserts that "[c]ases from the Supreme Courts of the United States and Wisconsin are consistent in holding that 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.'" (Brar's Br. 24.) Brar's reliance on Fourth Amendment jurisprudence is misplaced. Brar had already consented to the chemical test before the Form phase, and that implied consent was not prodded by duress or coercion. This implied consent passes Fourth Amendment muster.

Brar incorporates Fourth Amendment principles into the Form phase of the investigation, but this phase, initiated

after Brar had already implied his consent to the test, implicates no Fourth Amendment safeguards. For examples, Wisconsin cases have consistently upheld the sanctions imposed on drivers who refuse the test, though the imposition of adverse ramifications for refusing consent is an anathema to Fourth Amendment consent principles. And this Court has written, "the determination of whether the law enforcement officer reasonably conveyed the implied consent warnings is based upon the objective conduct of [the] officer, *rather than upon the comprehension of the accused driver*." *Piddington*, 241 Wis. 2d 754, ¶ 21 (emphasis added). Prioritizing an officer's objective conduct over a subject's understanding is a non-starter in a Fourth Amendment consent analysis. Moreover, there is an extensive body of case law holding that the essence of Fourth Amendment consent is the citizen's constitutional right to deny permission for the intrusion, and yet there is an equally consistent line of cases holding that under the implied consent law a person has no constitutional right to refuse the test. So if Brar is correct, and Fourth Amendment consent principles govern the Form phase of the investigation, the prior case law on this issue would be obliterated leaving an impotent statute in its wake.

To be sure, a subject has a choice after being read the Form. But it is a Hobson's choice: take the test and produce evidence, or refuse and be punished for doing so. *See Wintlend*, 258 Wis. 2d 875, ¶ 19. The presence of this choice does not transform the Form stage of the proceeding into a new attempt to solicit Fourth Amendment consent. The time for negotiation, for asking for permission, is over. It is time for "yes or no," and either choice can benefit the State and potentially hurt the subject. This is not Fourth Amendment consent terrain; it is the statutory world of implied consent, a world the subject has entered through his own behavior. The injection of Fourth Amendment consent principles into the Form phase of the implied consent statute contradicts

Wisconsin and U.S. Supreme Court cases dealing with the law and would severely undermine the statute's critical role in combating the national problem of drunken driving.

D. Neither *Missouri v. McNeely* nor *Birchfield v. North Dakota* represents a sea change in implied consent law.

The long-established law on implied consent is not altered by *Missouri v. McNeely*, 133 S. Ct. 1552 (2013), or *Birchfield v. North Dakota*, 579 U.S.___, 136 S. Ct. 2160 (2016).

McNeely is not an implied consent case. Although the facts of *McNeely* involved a refusal to take a chemical test, its rule of law, while adding significantly to Fourth Amendment jurisprudence, does not implicate implied consent law. The core holding in *McNeely* is that though alcohol dissipates somewhat quickly in the blood stream, this fact does not create an automatic exigent circumstance justifying the blood's warrantless seizure. The repercussion of this holding was significant, dramatically reducing the number of forced warrantless blood draws and overruling long-standing cases such as this Court's holding in *State v. Bohling*, 173 Wis. 2d 529, 494 N.W.2d 399 (1993). But while as a practical matter, the *McNeely* ruling will frequently arise in the OWI arrest situation when a defendant refuses a blood test, the rule does not invalidate the procedure that prompted the refusal.

In an OWI context, there are either two or three steps pertinent to the collection of chemical test evidence, and *McNeely* implicates only the third. Step 1 is the implied consent that occurred either when the defendant applied for his driver's license, or chose to drive. Step 2 is the reading of the Form culminating in the yes or no question: will the

defendant submit to the test or recant his earlier given consent and face the consequences? If the defendant submits, the process is complete after two steps and the blood is drawn pursuant to the implied consent and the subsequent submission. If the defendant refuses, the State can impose the adverse consequences of that refusal, such as the revocation of license and other administrative penalties, and the ability to comment on the refusal at trial.

If the defendant refuses, a third step emerges, the phase for collecting the evidence the defendant refused to give. If the State wants a chemical test after the refusal, it obtains the evidence in conformity with the Fourth Amendment. *McNeely* then comes into play, requiring in most instances a search warrant before the blood can be seized. *McNeely* impacts only that third step. *McNeely* has no impact on the implied consent statute itself.

This reading of *McNeely* is not conjecture; the holding makes clear its support of implied consent statutory schemes:

> As an initial matter, States have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws. For example, all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense. Such laws impose significant consequences when a motorist withdraws consent; typically the motorist's driver's license is immediately suspended or revoked, and most States allow the motorist's refusal to take a BAC test to be used as evidence against him in a subsequent criminal prosecution.

McNeely, 133 S. Ct. at 1566 (citation omitted).

Three years after *McNeely*, the U.S. Supreme Court revisited the blood draw issue in *Birchfield*. Unlike *McNeely*, *Birchfield* is an implied consent case, but it also does not affect Wisconsin's statutory implied consent law. *Birchfield* examined the issue of whether a person can be jailed for refusing a chemical test. The Court looked at the Fourth Amendment options available to the State in the event a defendant refuses. The Court opined that the State could search the breath incident to arrest, but would need a warrant to search blood. Thus, in cases where a subject refused a breath test, the imposition of a jail sentence as part of the penalty would be permissible, but incarceration would be impermissible for a refusal to submit to a blood test. *See Birchfield*, 136 S. Ct. at 2186.

Birchfield's disallowance of criminal penalties for a refusal to give blood has no impact on our implied consent statute, which does not criminalize refusals, be it for breath or blood. *Birchfield* writes approvingly of implied consent statutes that trigger administrative sanctions in the event of a refusal:

> Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply. Petitioners do not question the constitutionality of those laws, *and nothing we say here should be read to cast doubt on them*.

Birchfield, 136 S. Ct. at 2185 (emphasis added) (citations omitted).

And by endorsing a statute that criminalizes a breath test refusal, *Birchfield* further supports the State's contention that Fourth Amendment consent law is inapplicable during the Form stage of the proceedings: Fourth Amendment

consent principles cannot coexist with a statutory stage where a refusal can prompt a jail sentence.

E. *State v. Padley* should not be authority to overrule all pre-existing Wisconsin and federal case law dealing with implied consent statutes.

Brar also turns to *State v. Padley*, 2014 WI App 65, 354 Wis. 2d. 545, 849 N.W.2d 867, to argue that recent case law has fundamentally altered established implied consent law. It has not.

In *Padley*, the court of appeals rejected a claim that Wis. Stat. § 343.305(3)(ar)2., which authorizes officers to request a sample from a person who operated a motor vehicle that is involved in an accident that caused death, great bodily harm, or substantial bodily harm, is unconstitutional. *Padley*, 354 Wis. 2d 545, ¶¶ 10, 48, 54, 60. The court paused in its analysis of the case to address what it perceived to be confusion among the parties regarding the implied consent law. *Id.* ¶ 37. First, the court properly noted that when a person submits to a blood draw, he is not giving implied consent. *Id.* ¶ 38. The State agrees, for as argued above, the implied consent is given when the subject applies for the driver's license or when he chooses to drive. Second, the *Padley* court, again properly, noted that when a person refuses the test, he will have to accept the consequences of that choice. *Id.*

Third, and unfortunately, the *Padley* court tried to distinguish between implied consent when the person chose to drive, and what it termed *actual consent*, when the person decides to take the test. *Id.* ¶ 39. It is doubtful that the *Padley* court wanted its phrasing of "actual consent" for the "yes or no" stage after the reading of the Form to revolutionize how the implied consent law is to be interpreted, and to overrule

every Wisconsin and federal case that preceded it. It is far more likely that by "actual consent" the *Padley* court meant the choice the defendant makes in real time, and not by implication in an earlier time. But the term "actual consent" is confusing because it suggests the applicability of Fourth Amendment consent principles in the Form phase. And the use of the word "actual" suggests that this consent is more significant than the implied consent that triggered the application of the statute in the first place.

Padley cannot properly be read as establishing that only "actual consent" at the time the officer requests a sample can authorize the taking of a sample for testing. That interpretation would be contrary to the plain language of the implied consent statute, which provides that "[a]ny person who . . . operates a motor vehicle upon the public highways of this state . . . is deemed to have given consent to one or more tests of his or her breath, blood or urine . . . when requested to do so by a law enforcement officer." Wis. Stat. § 343.305(2). The court in *Padley* could not have intended to interpret the implied consent law in a manner that is inconsistent with the language of the statute, and with this Court's interpretation of the law.

Nor can *Padley* be read as the creation of two consents for two different purposes; the first being the implied consent to make a difficult choice if arrested, and the second the actual consent to take the test. The application for a driver's license, the decision to drive, is not a dress rehearsal for the real event, the "actual consent" moment. Rather, the moment of license application or driving is the defining moment, the moment the person consents to the test. The fact that this consent is implied does not vitiate its significance. And no matter how one tries to make *Padley*'s use of the term "actual consent" fit under the statute, it cannot be used as a justification for imputing Fourth Amendment consent

principles to the defendant's response to the reading of the Form without severely uprooting all the case law that preceded it.

Dicta in a court of appeals opinion approving an expansion in the scope of the implied consent law should not be the launching pad for an assault on the statute's long perceived purpose and interpretation. Yet, Brar does just that, relying on *Padley* and asserting, "The issue is not whether Brar *withdrew* his consent. The issue is whether he *provided* his consent." (Brar's Br. 18.) All of the case law that preceded *Padley*, and the plain meaning of the statute, point to the exact opposite premise. At the time Brar entered the police station, the issue was not whether he would grant consent, but whether he would recant the consent he had already given and face the harsh consequences of a refusal.

This Court and the United States Supreme Court have consistently endorsed penalties imposed on people who refuse, and have categorically stated that there is no constitutional right to refuse. The Form is not called the consent form,[4] the word consent is never used in the Form except to mention the implied consent statute at the beginning, and the Form's language does not remotely suggest an environment for giving "actual consent" within the Fourth Amendment meaning of the term.

So, for all the reasons argued above, Brar had given his implied consent to a chemical test before entering the police station.

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[4] *See* Justice Gableman's concurrence in *State v. Howes*, 2017 WI 18, ¶ 65, noting that the Form is a notice of the consequences of a refusal and not a request for consent.

II. Brar submitted to the blood test.

As argued above, Brar had already consented to the blood test when he arrived at the Middleton Police Department. This does not end our inquiry, because the issue remains whether Brar recanted that consent or submitted to the test. This issue's resolution is significant, since if Brar did recant his consent and refuse the test, the State, pursuant to *McNeely*, would have needed a search warrant for the blood. So, if Brar is deemed to have refused the test, the evidence the warrantless blood draw generated must be suppressed. Conversely, if Brar submitted to the test, there was no need to get a search warrant and the blood evidence is admissible.

A. Standard of review and applicable law.

An order granting or denying a motion to suppress evidence is a question of constitutional fact. *State v. Robinson*, 2010 WI 80, ¶ 22, 327 Wis. 2d 302, 786 N.W.2d 463. The circuit court's findings of evidentiary or historical fact are not to be overturned unless they are clearly erroneous. *State v. Richter*, 2000 WI 58, ¶ 26, 235 Wis. 2d 524, 612 N.W.2d 29. The application of these facts to constitutional principles are reviewed de novo. *State v. Williams*, 2001 WI 21, ¶¶ 18–19, 241 Wis. 2d 631, 623 N.W.2d 106.

The determination as to whether a person gives consent is a matter of historical fact, and thus this Court will uphold the trial court's finding on the issue, unless it is against the great weight and clear preponderance of the evidence. *State v. Phillips*, 218 Wis. 2d 180, 196–97, 577 N.W.2d 794 (1998).[5]

[5] The State recognizes that it is citing the standard of review as it relates to consent and not to whether a person submits or refuses to a chemical test after being read the Form. But if the finding of consent is a factual one, certainly a finding of submission or refusal is one as well.

The application of facts to the implied consent statute is a question of law that is reviewed de novo. *State v. Rydeski*, 214 Wis. 2d. 101, 106, 571 N.W.2d 417 (Ct. App. 1997).

Once the Form has been properly read to the subject, the person must promptly submit or refuse to submit to the requested step. *Id.* at 109. After the reading of the Form, the obligation is on the accused to take the test promptly or to refuse it promptly. *Neitzel*, 95 Wis. 2d at 205.

B. Brar said "of course," and then words to the effect of "I don't want to lose my license" in response to the reading of the Informing the Accused form.

There is a factual dispute between the parties as to whether Brar said "of course" in response to Officer Wood's request for a yes or no answer as to taking the chemical test. Brar insists that he did not say this, pointing out that both the court reporter and his own private recorder categorized his response as "inaudible." (Brar's Br. 19–21.) But the recording in the record solves the mystery: there is no doubt from the recording that Brar said "of course." And Officer Wood testified that he heard Brar say "of course" (42:7), and the trial court, which listened to the video, heard Brar say "of course." (42:47). It cannot be reasonably argued, in light of the audio recording in the record, that Brar did not say "of course." The audio is a bit garbled as to what Brar said after clearly saying "of course," but Officer Wood testified that Brar said something similar to not wanting his license revoked. (42:7.) The trial court found that after clearly hearing "of course," Brar's voice sort of trailed on but what could be made out seemed consistent with Officer Wood's recollection. (42:47.)

Brar did not testify at the motion hearing as to what he said. The trial court was in the proper position to listen to Officer Wood's testimony and evaluate his credibility, and the trial court listened to the recording. The trial court properly concluded that Brar said "of course" and then words akin to not wanting to lose his license. This fact finding is not clearly erroneous and should not be disturbed by this Court.

C. Brar's responses and actions were sufficient to establish that he chose to submit to the test.

Although Brar vigorously challenges the fact finding that he said "of course," he argues that, even if he did say "of course," his words did not constitute consent. But, as argued above, that is not the issue. The issue is not whether Brar consented to the test at the police station, but it is whether he recanted his earlier implied consent.

Brar did not recant his consent. The events that transpired from Brar's perceived submission till the time the blood was drawn show that. Brar never said he did not want the test; he made no verbal expression or exhibited any conduct protesting the test. The trial court properly noted this as part of its ultimate holding that Brar submitted to the test. (42:48.)

Brar argues that compliance is not the equivalent of consent. Again, Brar errs by imputing Fourth Amendment consent law into the analysis of whether he submitted or refused under the implied consent statutory framework: "Brar need not revoke consent that he never provided. He need not physically resist." (Brar's Br. 25.) The problem with this reasoning is, as argued above, Brar *had already consented* and, while his physical restraint was admirable, he

had plenty of opportunity to voice his resistance, or in any other number of ways demonstrate that he did not wish to submit and did want to refuse the test. And this he did not do.

Brar tries to equate the reading of the Form with the onset of a negotiation; a give and take between suspect and the police to see if they can reach a bargain. To illustrate this point, Brar offers an analogy: a customer entering a store to buy a television, who, when asked if he wished to purchase a set, says "Of course I want to replace my old television." (Brar's Br. 28–29.) This hypothetical badly misses the mark. To put the analogy in the proper implied consent law framework, Brar would have already purchased the TV, used it, and now is being asked to pay for it.

Brar claims that, even if Officer Wood felt he was submitting to the test, the matter was not settled for him. (Brar's Br. 24.) Brar then reasons that Officer Wood was either subjectively satisfied or too impatient to explore the matter further. (Brar's Br. 24.) A police officer's subjective perception as to whether a subject is submitting or refusing the chemical test is important, though not determinative. Often times the police officer is dealing with an intoxicated and frazzled subject. The officer has to do the best he can to interpret the subject's wishes, as the Form calls for two responses, yes or no; there is no third allowed response for ambiguous reflections. In this case, there was enough in Brar's words indicating submission, and his behavior subsequent to this determination confirmed Officer Wood's judgment.

Officer Wood's patience with Brar is notable. The recording shows an officer trying his best to handle Brar's questions and lamentations, and to firmly but fairly encourage Brar to make his Hobson's choice. Indeed, Brar was

perilously close to refusing the test, not by his words per se, but by his delaying tactics. This Court has held that conduct that is uncooperative or otherwise prevents the officer from getting the test can be viewed as a refusal, even if the defendant says that he does not want to refuse the test. *Reitter*, 227 Wis. 2d at 234–37. The *Reitter* court refers to this sustained unresponsiveness as a constructive refusal. *Id.* at 237. And *Neitzel* and *Rydeski* hold that it is the accused's responsibility to give a prompt yes or no response to the question posed after the reading of the Form. *See Neitzel*, 95 Wis. 2d at 205; *Rydeski*, 214 Wis. 2d at 109. So, Officer Wood was more than patient with Brar. Brar felt he was in a tough spot; at one point just a little before saying "of course," he lamented that there were no other options but yes or no, and the consequences of each answer. But it was a self-induced predicament.

Brar argues that even if he did consent, "he did not consent to anything in particular. He lacked an understanding of what the officer requested."[6] (Brar's Br. 31.) This is yet another reason that Fourth Amendment consent principles do not apply in the Form stage of the proceedings. In many instances, a full and complete understanding of the process can be prohibited by intoxication. This Court recognized this in *Piddington* when it emphasized that the important issue was the objective conduct of the officer in trying to communicate the Form, and not the defendant's actual understanding. *Piddington*, 241 Wis. 2d 754, ¶ 21. But Brar's questions and comments did not suggest confusion as to what was going on; rather, they consistently showed a wish not be in the situation.

[6] Brar had two prior convictions for OWI, and another case pending from an OWI arrest in Sauk County, a little more than a month before this arrest. (4:1–3, 6.) It is questionable that Brar was as confused or as uneducated about the process as he now claims.

Brar makes much of the fact that English is not his native tongue and his speech is heavily accented. But neither Officer Wood's testimony nor the recording show that Brar and Officer Wood could not effectively communicate with each other. Brar, while not always direct in his responses, showed an understanding of what Wood was saying; he complained about his lack of options, about portions of the Form that he did not think applied to him, asked for leniency, and in all manner acted as though there was no language barrier prohibiting communication. (25:2.)

Officer Wood acted properly in determining that when he heard Brar say "of course" and words akin to not wanting to lose his license, Brar was submitting to the test. Again, Officer Wood made the best judgment he could under the circumstances. If a police officer will recognize only clear and coherent expressions of submission or refusal before checking the box, he will often be quite frustrated because intoxicated people in the stressful OWI arrest environment are not often clear and coherent. So in a situation such as Brar's, where he was not combative nor argumentative, but was indecisive and evasive, Officer Wood was prudent to exercise some patience, and he was fair when he concluded that Brar's "of course" statement tipped the balance towards submission. Indeed, within the Hobson's choice, submission is the better option for the driver, because submission to the test means that the penalties for a refusal cannot be administered, but a refusal results in penalties and the test results can still be obtained with a warrant.

Brar argues that what he said after the "of course" statement shows he was not consenting. Leaving aside that the question is not whether he is consenting but rather whether he is recanting, his subsequent statements as to what type of test the officer was going to request fit in with a

submission conclusion. They certainly do not fit in with a refusal, and again there are only two possible options; submission or refusal. And asking if the officer needs a warrant for the blood test fits in more with a post submission exchange than a refusal query.

Brar submitted to the blood test, both in words and conduct. He continued to submit throughout the process. Since Brar submitted, there was no need to get a search warrant under *McNeely*.

III. Officer Wood did not mislead Brar when he indicated that he did not need a search warrant for the blood test.

Brar also complains that Officer Wood misled him by saying he did not need a search warrant for the blood test. But Officer Wood's statement was correct in the context of their conversation.

After making the "of course"statement, Brar asked what test would be involved, and after being told it was blood, he asked if Officer Wood needed a warrant. Officer Wood shook his head no. Brar argues that this unfairly misled him and Officer Wood should have said, "a warrant is required unless you consent." But that answer would have been misleading because Brar was not being asked to consent to the blood test; he had already done so before the Form phase began. In a vacuum, if Brar was actually entitled to a full explanation of all laws possibly implicated by a decision to submit or recant, a complete answer would have been, "I do not need a warrant unless you wish to recant your earlier implied consent, refuse the test, and subject yourself to all the penalties which follow." But Brar had already submitted, and

therefore it was a truthful response to say that no warrant was necessary.

Brar argues that Officer Wood did not believe that he submitted to the test until the discussion about the need for a warrant. Brar scolds the court of appeals for finding that Brar had already consented[7] before he was told that no warrant was needed, as Brar argues this finding contradicts the record. (Brar's Br. 37.) Brar is incorrect. The record supports a finding that it was the "of course" statement that triggered Officer Wood's determination that Brar was submitting to the test he had previously consented to take.

The following exchange at the motion hearing illustrates this point:

> Q. So where it says, "yes," as the defendant's response on the exhibit, did I hear you correctly that was in reference to the language you just referenced where he said something like, "Of course, I don't want my license revoked," or something of that nature?
>
> A. Correct.
>
> Q. Okay. And that's what you took as an affirmative response?
>
> A. Yes.

(42:7–8.)

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[7] Both the trial court and the court of appeals used the term consent to characterize Brar's response to the Form. While, as argued throughout this brief, this is not the technically correct word to use, both courts in finding Brar consented would surely also have concluded that Brar did not recant his implied consent to take the test.

Then shortly thereafter Officer Wood testified,

> A. After his response that I took to be "yes," he did ask what type of test would be completed, and I informed him again that it was blood. *He then did ask if a warrant was needed for this, and I believe that I shook my head no to answer his question to him.*

(42:9 (emphasis added).)

Brar does not reference the above testimony, which completely supports the court of appeals conclusions. Instead, he points to this exchange during Officer Wood's cross examination:

> A. After he told me "of course" and made statements, that's when I would have gone ahead and answered "yes" on the form and printed it out.
>
> Q. And that was immediately after he asked, don't you need a warrant for that?
>
> A. About the same time, yes, during that general time frame.

(42:20–21; Brar's Br. 12.)

Somehow Brar characterizes the above exchange as Officer Wood's admission that he did not believe he had consent until after Brar asked if the officer needed a warrant. (Brar's Br. 12.) It is true that both Brar's submission and his follow-up question about warrants were in the same relevant time frame. But Officer Wood's testimony during cross examination was not a retreat as to what he testified to earlier, that he viewed the "of course" statement as an affirmative response. The trial court found, and the court of

appeals agreed, that Officer Wood believed that Brar had assented to the test before he was told there was no need to get a search warrant. Those fact findings are not clearly erroneous. Brar was not misinformed, and he was not misled.

The rest of Brar's arguments on the warrant issue deal with Fourth Amendment consent case law, and are inapplicable in the implied consent statutory context. As there is no allegation that Officer Wood did not properly exercise his obligations in reading the Form to Brar, there was no need to get a search warrant, and the evidence the warrantless blood draw was properly deemed admissible.

Brar concludes his brief by correctly pointing out the national trend towards requiring the government to obtain search warrants for blood draws. *McNeely* eloquently describes the intrusiveness of a blood test; puncturing the skin with a needle is serious business. But so too is drunk driving, and our implied consent statute has been a long-established tool in combating this evil on society. A drunk driver is the scariest of offenders, as he invites everybody he shares the highway with into his dangerous orbit. The destruction and carnage caused yearly by drunk drivers is global in its scope and indiscriminate in its impact. It seems a very small price to pay, considering the privilege it is to drive, to have one's consent to a chemical test implied in the event an officer has probable cause to make an arrest for drunk driving. And if the driver submits to the test after being read the Form, there is no Wisconsin or federal precedent holding that a search warrant is required.[8]

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[8] In *Birchfield v. North Dakota*, 579 U.S.___, 136 S. Ct. 2160 (2016), the Court explored a suggestion offered by Justice Sotomayor, in her dissent that a search warrant be required for BAC testing in every case. After considering this proposition the Court properly

Brar consented to the chemical test prior to being arrested, by deciding to drive. After Officer Wood read Brar the Form, Brar submitted to the test by both words and conduct. Thus, the warrantless blood draw was lawful pursuant to Brar's implied consent, which he did not recant.

CONCLUSION

For all the foregoing reasons, this Court should affirm both the trial court and the court of appeals.

Dated this 13th day of March, 2017.

Respectfully submitted,

BRAD D. SCHIMEL
Wisconsin Attorney General

DAVID H. PERLMAN
Assistant Attorney General
State Bar #1002730

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1420
(608) 266-9594 (Fax)
perlmandh@doj.state.wi.us

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noted that such a rule would swamp the courts and this substantial burden would be shouldered with no commensurate benefit. *Birchfield*, 136 S. Ct. at 2180–82.

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 7,145 words.

Dated this 13th day of March, 2017.

_____
DAVID H. PERLMAN
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 13th day of March, 2017.

_____
DAVID H. PERLMAN
Assistant Attorney General