STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 15AP1452-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

GARY F LEMBERGER,

Defendant-Appellant.

PLAINTIFF-RESPONDENT'S BRIEF

ON APPEAL FROM THE CIRCUIT COURT OF DANE COUNTY,
BRANCH 7, THE HONORABLE WILLIAM E HANRAHAN, PRESIDING

Shaun W. O'Connell
Assistant District Attorney
Dane County, Wisconsin
Attorney for Plaintiff-Respondent
State Bar No. 1090459

215 South Hamilton Street
Dane County Courthouse, Room 3000
Madison, WI 53703
Telephone: (608)266-4211

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STATEMENT OF ISSUE

I. Does the a defendant have a constitutional right to refuse a chemical test of his blood, breath, or urine after an arrest for operating while intoxicated?

The trial court answered: No.

II. Is trial counsel ineffective for failing to object to the State's use of the defendant's refusal as evidence of guilt?

The trial court answered: No.

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The State does not request oral argument or publication because the issues in this case can be resolved by applying established legal principles to the facts.

STATEMENT OF THE CASE AND FACTS

On April 5, 2014 at approximately 4:30 p.m., Madison Police Department Officer Andrew Naylor received a call from dispatch regarding an erratic driver in the City of Madison, WI. (R. 62 at 66.) Officer Naylor was able to make contact with the suspect vehicle on Highway 12/18. (*Id.* at 67.) Officer Naylor identified the driver as the defendant, Gary Lemberger. (*Id.* at 7, 68.)

Immediately upon making contact with the defendant, Officer Naylor observed an odor of intoxicants coming from the defendant's breath. (Id at 6-7, 69.) The defendant had bloodshot, glassy eyes, spoke slowly, and had slurred speech. (*Id.* at 7, 69-70.) Based on his suspicion that the defendant was driving while intoxicated, Officer Naylor asked the defendant to submit to field sobriety tests. (*Id.*) Officer Naylor observed numerous clues of intoxication as he administered the field sobriety tests. (*Id.* at 9.) Based on the defendant's performance on the field sobriety tests, Officer Naylor placed the defendant under arrest for operating while intoxicated. (*Id.* at 10, 79.)

After placing the defendant under arrest, Officer Naylor read the defendant the Informing the Accused form.

(*Id.* at 10.) Officer Naylor requested the defendant submit to a breath test, which the defendant stated he would comply with. (*Id.* at 10) After transporting the defendant to the West District of the Madison Police Department, Officer Naylor read him the Informing the Accused form again. (*Id.* at 10, 82-84.) This time, the defendant responded, "Hell no." (*Id.* at 11, 84.) Officer Naylor took this to mean the defendant was refusing to comply with providing a chemical sample of his breath. (*Id.* at 11.) [1]

On November 5, 2014, Judge William Hanrahan presided over a civil refusal hearing regarding the events of April 5, 2014. (*Id.* at 4.). After the circuit court received testimony, defense counsel argued that the defendant's refusal was not improper. (*Id.* at 21-22.)The circuit court found, "the officer complied with what's required, that the refusal to take the test offered by the officer was improper, and the State may comment upon that during the course of trial." (*Id.* at 23.)

At trial on November 5, 2014, the State commented in opening statements that the defendant's refusal to provide

[1] The defendant's brief states, "Mr. Lemberger then refused the breath test, knowing he could request his blood be drawn instead. Id. at 17." There is nothing in the record to suggest the defendant knew or requested an alternative test.

a breath sample for chemical testing showed a consciousness of guilt. (*Id.* at 33,37.)Officer Naylor testified that the defendant refused to submit a sample of his breath for testing. (*Id.* at 84-85.) During closing arguments, the State commented again on the defendant's refusal to provide a breath sample. (*Id.* at 181-182, 187.) The defendant's attorney did not object when the State introduced evidence of and commented on the defendant's refusal to provide a breath sample for testing.

The jury found the defendant guilty of operating while intoxicated. (*Id.* at 196.)

On June 5, 2015, the defendant filed a Post-Conviction Motion for a new trial. (R. 49.) The defendant presented the same arguments that he now presents to this court. (R. 51.) The circuit court denied the defendant's motion without a hearing. (R. 53.)

ARGUMENT

I. A defendant does not have a constitutional right to refuse a chemical test of his blood, breath, or urine after an arrest for operating while intoxicated and evidence of a refusal can be used against the defendant at trial.

A. Under Wisconsin's implied consent law, any person who operates a motor vehicle on a highway in Wisconsin is deemed to have given consent to the taking of one or more samples of his or her blood, breath or urine for testing, when requested by a law enforcement officer.

Under the plain language of the implied consent law, and as the law has been interpreted by the Wisconsin Supreme Court and by this court, a person who operates a motor vehicle on a Wisconsin highway has given consent to a test of his or her blood, breath or urine. Wis. Stat. § 343.305(2). When a law enforcement officer requests a sample of blood, breath or urine under § 343.305(3)(a), the officer does not ask for consent, because the person has already given consent. The officer requests that the person submit to a test. If the person submits, one or more samples may be taken and one or more tests may be administered. If the person refuses, thereby withdrawing consent, he or she faces revocation of his or her operating privilege. A person has no right to refuse testing. The choice is either to submit, and follow through on the

consent the person has already given, or withdraw that consent and face revocation.

The implied consent law states that "Any 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 or required by a law enforcement officer. Wis. Stat. § 343.305(2). The Wisconsin Supreme Court has consistently interpreted the implied consent law as providing that a person gives consent to testing by obtaining a driver's license or operating a motor vehicle on a highway in Wisconsin.

In *Scales v. State*, 64 Wis.2d 485, 219 N.W.2d 286 (1974), the Wisconsin Supreme Court recognized that the purpose of the implied consent law is "to impose a condition on the right to obtain a license to drive on a Wisconsin highway. The condition requires that a licensed driver, by applying for an[d] receiving a license, consents to submit to chemical tests for intoxication under statutorily determined circumstances." *Id.* at 494.

In *State v. Neitzel*, 95 Wis.2d 191, 289 N.W.2d 828 (1980), the court explained that the consent necessary to

authorize chemical testing is not given at the time a law enforcement officer requests a test, because the driver

> has, by his application for a license, waived whatever right he may otherwise have had to refuse to submit to chemical testing. It is assumed that, at the time a driver made application for his license, he was fully cognizant of his rights and was deemed to know that, in the event he was later arrested for drunken driving, he had consented, by his operator's application, to chemical testing under the circumstances envisaged by the statute.

Id. at 201. The Supreme Court added that "The entire tenor of the implied consent law is . . . that consent has already been given and cannot be withdrawn without the imposition of the legislatively imposed sanction of mandatory suspension." *Id*. at 203.

In *State v. Zielke*, 137 Wis.2d 39, 403 N.W.2d 427 (1987), the Supreme Court again recognized that consent to testing under the implied consent law is given when a person operates a motor vehicle on a highway in Wisconsin, not when law enforcement asks for submission to a test. The Court stated that under the implied consent law, "The refusal procedures are triggered when an arrested driver refuses to honor his or her previously given consent implied by law to submit to chemical tests for intoxication. The consent is implied as a condition of the

privilege of operating a motor vehicle upon state highways." *Id*. at 47-48 (citing *Neitzel* at 201) (footnote omitted).

By operating a vehicle on April 5, 2014, the defendant thereby consented to a chemical test of his breath if the statutory conditions were met. There is no dispute that the arresting officer following the statutory requirements to request a breath sample.

B. Under Wisconsin's implied consent law, a defendant's refusal to submit to a chemical test of his blood, breath, or urine may be used against him at trial.

1) Case law has held that a refusal can be used at trial.

Wisconsin and federal courts have long held that a person arrested for operating while intoxicated who refuses to provide a blood, breath, or urine sample may have that refusal used as evidence at trial. Despite the defendant's assertion otherwise, no Wisconsin court has overruled this principle.

In *State v. Albright*, 98 Wis.2d 663 (Ct. App. 1980), the Wisconsin Court of Appeals held that Albright's refusal to provide a breath sample was admissible at trial. Albright was stopped by State Trooper Randall. Id. at 666.

After administering field sobriety tests to Albright, Trooper Randall arrested Albright for operating while intoxicated. *Id*. Albright refused to take a breathalyzer test. *Id.* At trial, the prosecutor told the jury in his opening statement that Albright had been offered but refused to a take a breath test. Id at 667. The court in *Albright* held:

> A reasonable inference from refusal to take a mandatory breathalyzer test is consciousness of guilt. The person is confronted with a choice of the penalty for refusing a test, or taking a test which constitutes evidence of his sobriety or intoxication. Perhaps the most plausible reason for refusing the test is consciousness of guilt, especially in view of the option to take an alternative test.

Id. at 668-669.

The Wisconsin Supreme Court recognized this same reasoning in *State v. Bolstad*, 124 Wis.2d 576, 585, 370 N.W.2d 257, 261-262 (1985) (“The state may submit the relevant and, hence, admissible evidence that Bolstad refused the test for blood alcohol content.”), *State v. Crandall*, 133 Wis.2d 251, 260, 394 N.W.2d 905, 908 (1986) (“The introduction of this refusal at trial was not fundamentally unfair.”), and *Zielke* at 49 (“There is a further incentive for statutory compliance: the fact of the defendant's refusal to submit to a test may be introduced

at trial on the substantive drunk driving offense as a means of showing consciousness of guilt.”).

The defendant cites to *Griffin v. California*, 380 U.S. 609 (1965) to argue that the State cannot use a defendant’s invocation of his constitutional rights as evidence of guilt. In Griffin, the Court held that the prosecutor's comments on the defendant's failure to testify violated the self-incrimination clause of the Fifth Amendment. *Id.* at 615. The standard laid out in Griffin applied exclusively to penalties associated with a defendant’s invocation of his refusal to testify. The Griffin court did not expand its holding to circumstances outside of a defendant’s invocation of his right to remain silent.

Years after Griffin, the United States Supreme Court addressed how Griffin applied to blood tests after an arrest for driving while intoxicated in *South Dakota v. Neville*, 459 U.S. 553 (1983). South Dakota statute permitted a person suspected of driving while intoxicated to refuse to submit to a blood-alcohol test, but authorized such refusal to be used against him at trial. *Id*. at 556. Neville was arrested for driving while intoxicated and refused a blood alcohol test. *Id*. at 554. The state then used Neville’s refusal as evidence at trial. The Court

overruled the trial court's suppression of evidence of Neville's refusal. *Id*. at 564. The Court specifically acknowledged that a defendant's refusal to provide a blood sample after an arrest for drunk driving and its relationship with *Griffin*. The Court held:

> Unlike the defendant's situation in *Griffin*, a person suspected of drunk driving has no constitutional right to refuse to take a blood-alcohol test. The specific rule of *Griffin* is thus inapplicable.

Neville at 560, footnote 10. Based on the Court's decision in Neville, the defendant's reliance on *Griffin* to support his argument is misplaced.

The defendant argues *Skinner v. Ry. Labor Exec. Ass'n*, 489 U.S. 602 (1989) is a defining case in which the Court took up the issue of searches after an arrest for operating while intoxicated implicating the Fourth Amendment. *Skinner* held that a breath test implicates similar concerns as a blood test in relation to a search. *Id.* at 616-617. The defendant suggests that *Skinner*, decided in 1989, would have had an adverse effect on the rulings of *Albright* and *Bolstad*, decided in 1980 and 1986, if Skinner had been decided prior to *Albright* and *Bolstad*. The defendant argues that prior to *Skinner*, Wisconsin courts held a distinction between breath tests and other tests, such as a blood test.

However, the *Albright* court acknowledged its decision was not limited to only a breath test, but also a urine test. The *Albright* court noted:

> The only rationale for a rule prohibiting comment on a refusal would be that there is a right to refuse the test. Wisconsin drivers have no constitutional right to refuse to take the breathalyzer… In the context of refusal to take a chemical test to determine the amount of alcohol in a person's blood, there is no difference between the alternative chemical tests. The same rule applies to all.

Albright at 669. That court did not hold that a breath test is not a search. Instead, the Albright court recognized that while a breath test fell under the same constitutional search provisions as a blood or urine test, a defendant did not have a constitutional right to refuse to provide a breath test.

Additionally, decades before *Albright*, the United States Supreme Court had already held blood tests of this nature implicated the Fourth Amendment. In *Schmerber v. California*, 384 U.S. 757 (1966), the Court wrote:

> It could not reasonably be argued, and indeed [the state] does not argue, that the administration of the blood test in this case was free of the constraints of the Fourth Amendment. Such testing procedures plainly constitute searches of 'persons,' and depend antecedently upon seizures of 'persons,' within the meaning of that Amendment.

Id. at 767. The *Albright* court had the benefit of the *Schmerber* decision to rely on when it held a defendant had no constitutional right to refuse a test, breath or otherwise. *Skinner* added nothing further.

For purposes of Forth Amendment searches, there is no difference between a blood, breath, or urine test. A defendant has no constitutional right to refuse to provide a breath, blood, or urine sample for chemical testing after being arrested for operating while intoxicated.

2) Recent case law does not prohibit the State from using a defendant's refusal at trial.

In his brief, the defendant claims that in *Missouri v. McNeely*, 133 S.Ct 1552 (2013), the United States Supreme Court held, "a defendant has a constitutional right to refuse a warrantless alcohol search in a drunk driving case – despite the existence of an implied consent statute." Def. Brief 7. *McNeely* makes no such holding, explicitly or implicitly. The Supreme Court in *McNeely* held that, "in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant." *McNeely* at 1568. Rather, the Court "looks to the totality of the circumstances" in evaluating

exigency. *Id*. at 1559. *McNeely* runs contrary to defendant's argument. The Court stated its support for penalties against chemical test refusal. The Court noted that most states allow a motorist's refusal to be used as evidence against him in a subsequent criminal prosecution. *Id*. at 1566. The Court also discussed the "broad range of legal tools" that states have to enforce operating while intoxicated laws and secure blood alcohol evidence without undertaking warrantless, nonconsensual blood draws. *Id*. The Court recognized that all 50 states have adopted implied-consent laws, which "require motorists, as a condition of operating a motor vehicle within the State, to consent to [blood alcohol concentration] testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense." *Id*. "Such laws impose significant consequences when a motorist withdraws consent...." *Id*. Rather than support the defendant's argument, *McNeely* actually undermines the defendant's position. *McNeely* supports the principle that penalizing a defendant for a refusal, including using the refusal as evidence at trial, is constitutional.

The defendant also misstates the ruling in *State v. Padley*, 354 Wis.2d 545, 849 N.W.2d 867 (Ct. App. 2014).

Padley does not hold that a defendant has a constitutional right to refuse a test, nor does it hold that such a refusal is inadmissible at trial. *Padley* discussed sanctions associated with a refusal and found that they are proper. The *Padley* court noted that "choosing the 'no' option is an unlawful action, in that it is penalized by 'refusal violation' sanctions..." *Id*. at 571. These refusal sanctions include the State using a defendant's refusal as evidence at trial. *Padley* does not suggest there is a constitutional right to refuse a test nor does it hold that introducing evidence of such a refusal at trial is unconstitutional.

The defendant cites several cases holding that the prosecution may not use a defendant's refusal to consent to a warrantless search as evidence at trial. However, none of these cases are applicable as they do not involve an officer's request under the implied consent law. The defendant has cited no controlling authority in which a court prohibited the prosecution from using a defendant's refusal to submit to a blood, breath, or urine chemical test after an arrest for operating while intoxicated at trial. The defendant does not cite to any such case because no such case exists.

The defendant was provided a hearing, as required under Wisconsin law, in which the circuit court determined the defendant improperly refused to provide a breath test after his arrest for operating while intoxicated. The circuit court held, in conformity with long established law, the defendant's refusal could be used as evidence at trial. The State then, as permitted by law, used the defendant's refusal as evidence at trial. The defendant had no constitutional right to refuse to breath test, therefore had no right to have this evidence excluded at trial for operating while intoxicated.

II. The circuit court properly denied the defendant's ineffective assistance of counsel claim without a hearing because trial counsel's performance was not deficient.

A. General legal principles that guide review of ineffective assistance of counsel claims.

The United States Constitution's Sixth Amendment right of counsel and its counterpart under Article I, § 7 of the Wisconsin Constitution encompass a criminal defendant's right to the effective assistance of counsel. See *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *State v. Sanchez*, 201 Wis.2d 219, 226-36, 548 N.W.2d 69 (1996). The Sixth Amendment right to counsel protects a criminal

defendant's fundamental right to a fair trial. *Strickland* at 684-86.

A defendant alleging ineffective assistance of trial counsel must prove that counsel's performance was deficient, and that he suffered prejudice as a result of that deficient performance. *Id*. at 687. If a court concludes that a defendant has not established one prong of the test, the court need not address the other prong. *Id*. at 697.

To prove deficient performance, the defendant must show that his counsel's representation "fell below an objective standard of reasonableness" considering all the circumstances. *Id*. at 688. The defendant must demonstrate that specific acts or omissions of counsel fell "outside the wide range of professionally competent assistance." *Id*. at 690. In assessing the reasonableness of counsel's performance, a reviewing court should be "highly deferential," making "every effort... to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id*. at 689. A court should presume that counsel rendered adequate assistance. *Id*. at 690; see also *State v.*

Carter, 2010 WI 40, ¶ 22, 324 Wis.2d 640, 782 N.W.2d 695 ("[C]ounsel's performance need not be perfect, nor even very good, to be constitutionally adequate.").

To demonstrate prejudice, the defendant must affirmatively prove that the alleged deficient performance prejudiced his defense. *Strickland* at 693. The defendant must show something more than that counsel's errors had a conceivable effect on the proceeding's outcome. *Id.* Rather, the defendant must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694; see also *Carter* ¶ 37. "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011). Stated simply, a defendant must show that trial counsel's errors were so serious that the defendant was deprived of a fair trial and reliable outcome. *Strickland* at 687.

A circuit court may deny a postconviction motion alleging ineffective assistance of counsel without a Machner hearing unless the motion alleges sufficient facts to entitle a defendant to relief or is based on conclusory allegations. The circuit court may still deny an

evidentiary hearing if the record conclusively demonstrates that a defendant is not entitled to relief. A circuit court must exercise its independent judgment and support its decision denying a hearing through a written decision based upon a review of the record and pleadings. *State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis.2d 568, 682 N.W.2d 433.

If a circuit court improperly denies the defendant a hearing on an ineffective assistance of counsel claim, a reviewing court will remand the matter for a Machner hearing. The lack of a hearing prevents an appellate court from reviewing the trial counsel's performance. *State v. Curtis*, 218 Wis.2d 550, 554-55, 582 N.W.2d 409 (Ct. App. 1998).

B. The circuit court properly denied the defendant's motion for a Machner hearing.

The defendant filed a Post-Conviction Motion For A New Trial in which he put forward the same argument as he now presents to this court: that trial counsel was ineffective for failing to object to the introduction of evidence under a legal theory that courts have repeatedly rejected. The circuit responded to the motion as follows:

> Defendant's claim that comments during trial made by the prosecutor regarding his refusal to take tests required under Wisconsin's Implied Consent Law were violative of his constitutional right,

> is wholly unsupported by Wisconsin law. The defendant’s claims are without merit.

(R 53.) The circuit court made this holding based on the same well established law this brief cites to, namely *Albright* and *Bolstad*. (*Id.*)

Furthermore, supposing the defendant’s argument has any merit, an attorney's performance will not be deemed deficient for a failure to argue an unsettled point of law. *State v. Maloney*, 2005 WI 74, 281 Wis.2d 595, 698 N.W.2d 583 (2005). While the use of a refusal to provide a breath test is not unsettled law, that is at most all the defendant alleges here. Because trial counsel was not ineffective, it is not necessary to address the second prong of prejudice.

The circuit court properly denied the defendant a hearing on his post-conviction motion because trial counsel was not ineffective for failing to advance a novel, supported legal theory.

CONCLUSION

For the foregoing reasons, the State respectfully asks this court affirm the trial court's denial of a motion for a new trial.

Dated this 3rd day of March, 2015, at Madison, Wisconsin.

Shaun W. O'Connell
Assistant District Attorney
Dane County, Wisconsin
Attorney for Plaintiff-Respondent
State Bar No. 1090459

215 South Hamilton Street
Dane County Courthouse, Room 3000
Madison, WI 53703
Telephone: (608)266-4211

CERTIFICATION

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

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Dated: _____March 3rd, 2016___

Signed,

_____
Attorney

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 March, 2016.

_____
Shaun W. O'Connell
Assistant District Attorney
Dane County, Wisconsin