STATE OF WISCONSIN

IN SUPREME COURT

No. 2015AP1452-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GARY F. LEMBERGER,

Defendant-Appellant-Petitioner.

ON APPEAL FROM A DECISION OF THE WISCONSIN COURT OF APPEALS AFFIRMING A JUDGMENT OF CONVICTION AND AN ORDER DENYING A MOTION FOR POSTCONVICTION RELIEF, BOTH ENTERED IN THE CIRCUIT COURT FOR DANE COUNTY, THE HONORABLE WILLIAM E. HANRAHAN, PRESIDING.

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

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

SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS

The defendant-appellant, Gary F. Lemberger, was convicted of operating a motor vehicle under the influence of an intoxicant, after a jury trial. (43.) Lemberger was arrested after two citizens called 911 to report a vehicle being driven erratically on Highway 12/18 (the Beltline) in Madison, at around 4:30 p.m. on April 5, 2014. (62:40–42, 47–49, 58, 66.) City of Madison Police Officer Andrew Naylor stopped the vehicle and identified Lemberger as the driver. (62:68.) When Officer Naylor made contact with Lemberger, he "immediately noticed a strong odor of intoxicants coming from his breath." (62:69.) Officer Naylor said that the "intoxicant" he smelled was alcohol. (62:70.) Officer Naylor also observed that Lemberger "had bloodshot as well as glassy eyes, and he was speaking with a slurred speech and speaking slowly." (66:69–70.) Lemberger denied that he had been drinking. (62:70.)

Officer Naylor administered field sobriety tests. (62:72.) He found six of six possible clues on the Horizontal Gaze Nystagmus test (HGN), and five of eight possible clues on the Walk and Turn test. (62:72–76.)[1]

[1] Officer Naylor also administered the One Leg Stand test, but he did not testify about whether he observed any clues on that test. (62:76–78.)

Officer Naylor arrested Lemberger for OWI, and read him the Informing the Accused form. (62:79–80.) Officer Naylor asked Lemberger if he would submit a breath sample, and Lemberger initially agreed to do so. (62:80.) Officer Naylor transported Lemberger to the police station, and observed him for 20 minutes. (62:80–81.) Officer Naylor verified that Lemberger had nothing in his mouth, and he noticed that Lemberger still emitted a "very strong odor of intoxicants." (62:81.)

Officer Nicholas Ellis entered the room and prepared the intoximeter machine to process a breath sample. (62:81, 118–19.) He sat about 10 to 12 feet from Lemberger, and observed that Lemberger "had slurred speech," and "bloodshot, glassy eyes," but "seemed to be answering questions cooperatively." (62:120.)

Officer Naylor testified that during the 20-minute observation period, Lemberger recanted and said he would not submit a breath sample. (62:82.) After the 20-minute period, Officer Naylor read the Informing the Accused form to Lemberger again and asked if he would submit to a breath test. Lemberger answered, "Hell no." (62:82–84, 122.) The officers did not obtain a sample of Lemberger's blood, breath, or urine.

The State charged Lemberger with OWI as a fourth offense, and cited him for his refusal to submit to chemical testing. (1; 2.) The circuit court, the Honorable William E. Hanrahan, presiding, held a refusal hearing immediately before Lemberger's trial. (62:4–23.) The court concluded that Lemberger improperly refused a request for a breath sample. (62:23.)

Lemberger was tried and a jury found him guilty of OWI. (62:196–97.) During his opening statement, the prosecutor referred to Lemberger's refusal to submit a breath sample, and told the jury that it should consider Lemberger's refusal as evidence of his consciousness of guilt that he was operating while intoxicated. (62:33, 36–37.) Lemberger's defense counsel did not object to the prosecutor's comments. Three of the people who observed Lemberger's driving, resulting in two 911 calls, testified about their observations. (62:40–42, 47–49, 58.) Officer Naylor testified that after observing Lemberger, he believed Lemberger was under the influence of an intoxicant. (62:78.) Both Officer Naylor and Officer Ellis testified that Lemberger refused a breath test. (62:82–84, 122.)

Lemberger testified that he had taken the prescription drug Seroquell, but he denied that he was impaired. (62:141–42.) Lemberger also denied that he had consumed any alcohol (62:137, 139, 149), or that he drove erratically. (62:147–49.)

During his closing argument, the prosecutor again referred to Lemberger's refusal to submit a breath sample, and told the jury that it should consider Lemberger's refusal as evidence of his consciousness of guilt that he was operating while intoxicated. (62:181–82, 187.) Lemberger's defense counsel did not object to the prosecutor's comments.

The trial court instructed the jury that it should consider evidence that Lemberger had refused a breath test along with the other evidence in the case, "giving to it the weight you decide it is entitled to receive." (62.170.) The jury returned a guilty verdict. (62:195–97.)

Lemberger moved for a new trial. (48; 49; 51.) He asserted that the prosecutor violated his constitutional rights by telling the jury that it should use his refusal as evidence of consciousness of guilt (51:3–10), and that his trial counsel was ineffective for not objecting to the prosecutor's comments. (51:10–13.)

The circuit court denied Lemberger's motion without a hearing in a written decision and order. (53.) The court concluded that Lemberger'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 rights, is wholly unsupported by Wisconsin law." (53.) The court also noted that in his brief, Lemberger "completely failed to address controlling legal authority, including *State v. Albright*, 98 Wis. 2d 663 (Ct. App. 1980), *State v. Bolstad*, 124 Wis. 2d 576, 298 N.W.2d 196, 370 N.W.2d 257 (1985), and others." (53.)

Lemberger appealed, and the court of appeals affirmed the circuit court's decision and order. *State v. Lemberger*, No. 2015AP1452-CR, 2016 WL 1552158 (Wis. Ct. App. Apr. 14, 2016) (unpublished) (A-App. 106–11.) The court of appeals concluded that Lemberger forfeited his arguments because he did not assert in the circuit court that the binding Wisconsin cases had been silently overruled. *Id.* ¶ 8. The court of appeals also concluded that it lacked authority to interpret the implied consent law differently than it was interpreted in *Albright*, *Bolstad*, and *State v. Crandall*, 133 Wis. 2d 251, 394 N.W.2d 905 (1986), and that a review of Lemberger's claims "on the merits would certainly result in affirmance by this court." *Lemberger,* 2016 WL 1552158, ¶¶ 10–11. This Court then granted Lemberger's petition for review.

SUMMARY OF ARGUMENT

Lemberger sets forth five issues. But he acknowledges that his claims "must be reviewed within the framework of ineffective assistance of counsel." (Lemberger's Br. 18.) Both the circuit court and court of appeals recognized that Wisconsin case law establishes that a prosecutor may properly reference a defendant's refusal and argue that the jury can infer that a refusal shows consciousness of guilt. Lemberger does not point to any decision of this Court or the United States Supreme Court that has overruled these binding cases. And he acknowledges that in *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016), the United States Supreme Court concluded that there is no Fourth Amendment right to refuse a breath test without consequences. Lemberger asks this Court not to apply *Birchfield*. (Lemberger's Br. 10.) He urges this Court to instead adopt the court of appeals' interpretation of the implied consent law in *State v. Padley*, 2014 WI App 65, 354 Wis. 2d 545, 849 N.W.2d 867, and find a right to refuse a breath test without consequences under the Wisconsin Constitution. (Lemberger's Br. 21.)

This Court should reject Lemberger's claims. His ineffective assistance claim fails because his trial counsel was not ineffective for not objecting to the prosecutor's proper comments about Lemberger's refusal. The trial court could not have disregarded binding case law and sustained an objection. Lemberger's constitutional claims fail because the Supreme Court and this Court have both found that there is no constitutional right to refuse a breath test without consequences. And *Padley* could not and did not interpret the implied consent law in a manner that would recognize a constitutional right to refuse a breath test without consequences.

ARGUMENT

I. Lemberger's trial counsel was not ineffective for not objecting to the prosecutor's comments regarding Lemberger's refusal to submit a breath sample for chemical testing.

A. Applicable legal principles.

To prevail on an ineffective assistance of counsel claim, "[a] defendant must prove both that his or her attorney's performance was deficient and that the deficient performance was prejudicial." *State v. Allen*, 2004 WI 106, ¶ 26, 274 Wis. 2d 568, 682 N.W.2d 433 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). To prove deficient performance, a defendant must prove that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* (citations omitted). To prove prejudice, a defendant must show "a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *Id.* (citing *State v. Guerard*, 2004 WI 85, ¶ 43, 273 Wis. 2d 250, 682 N.W.2d 12). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (citations omitted).

An appellate court reviews a circuit court's decision denying a motion without a hearing under a mixed standard of review. *Allen*, 274 Wis. 2d 568, ¶ 9. A reviewing court determines de novo "whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief." *Id.* (citing *State v. Bentley*, 201 Wis. 2d 303, 309–10, 548 N.W.2d 50 (1996)). "If the motion raises such facts, the circuit court must hold an evidentiary hearing." *Id.* (citing *Bentley*, 201 Wis. 2d at 310, *Nelson v. State*, 54 Wis. 2d 489, 497, 195 N.W.2d 629 (1972)). But "if the motion does not raise facts sufficient to entitle the

movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing." *Id.* (citing *Bentley*, 201 Wis. 2d at 310–11; *Nelson*, 54 Wis. 2d at 497–98). The circuit court's decision to deny the motion without a hearing is reviewed "under the deferential erroneous exercise of discretion standard." *Id.* (citations omitted).

B. Lemberger's trial counsel did not perform deficiently by not objecting when the prosecutor told the jury that it could infer consciousness of guilt from Lemberger's refusal.

In his motion for a new trial, Lemberger asserted that his trial counsel provided ineffective assistance by not objecting at trial when the prosecutor referenced Lemberger's refusal to submit to a breath test, and told the jury that it should infer from the refusal that Lemberger was conscious of his guilt. The circuit court rejected Lemberger's claim without a hearing, noting that his argument was contrary to *Albright* and *Bolstad*. The court of appeals affirmed, concluding that Lemberger's argument is contrary to *Albright*, *Bolstad*, and *Crandall*.

Both the circuit court and court of appeals were correct. Settled law establishes that the State may present evidence of an improper refusal, and that the prosecutor may argue that the jury should infer consciousness of guilt from a refusal.

In *Albright*, the court of appeals concluded that evidence of a defendant's refusal to submit a breath sample under the implied consent law is "relevant and constitutionally admissible" at trial for OWI. 98 Wis. 2d at

672. The court also concluded that "[a] reasonable inference from refusal to take a mandatory breathalyzer test is consciousness of guilt." *Id.* at 668. The court explained that "[t]he 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 668–69. The court of appeals noted that the "only rationale for a rule prohibiting comment on a refusal would be that there is a right to refuse the test." *Id.* at 669. The court then rejected that notion, stating, "Wisconsin drivers have no constitutional right to refuse to take the breathalyzer." *Id.*

In *Bolstad*, this Court affirmed that evidence of refusal to submit a blood sample is admissible at trial, stating that "[t]he state may submit the relevant and, hence, admissible evidence that Bolstad refused the test for blood alcohol content." 124 Wis. 2d at 585. This Court added that "refusal evidence is relevant, because it makes more probable the crucial fact of intoxication," because, "[a] reasonable inference from refusal to take a mandatory [blood alcohol] test is consciousness of guilt." *Id.* (quoting *Albright*, 98 Wis. 2d at 668).

In *Crandall*, this Court addressed whether the admission of evidence of refusal violated due process when the defendant was not informed that the evidence could be admitted. 133 Wis. 2d at 254. This Court found no due process violation. It relied on *South Dakota v. Neville*, 459 U.S. 553 (1983), in which the U.S. Supreme Court held that admission of refusal evidence was constitutional even in the absence of a specific warning because the defendant was informed that "his refusal to take the test could lead to a loss

of his driver's license." *Crandall*, 133 Wis. 2d at 254 (citing *Neville*, 459 U.S. at 566.) This Court stated, "We adopt the same rationale to find that there was no due process violation of the Wisconsin Constitution." *Id.* at 256. This Court rejected the defendant's argument that the Wisconsin Constitution provides greater protection than the U.S. Constitution, concluding that the Wisconsin Constitution requires no more safeguards or warnings than the Supreme Court found necessary in *Neville*. *Id.* at 260. This Court again affirmed that Wis. Stat. § 343.305 "[c]learly does not recognize a right to refuse the test." *Id.* at 257 (quoting *Albright*, 98 Wis. 2d at 671). It concluded that "[i]n Wisconsin there is no constitutional or statutory right to refuse a breathalyzer test." *Id.* at 254.

In *State v. Zielke*, 137 Wis. 2d 39, 49–50, 403 N.W.2d 427 (1987), this Court again recognized that the fact of a defendant's refusal may be introduced at trial to show consciousness of guilt. This Court added that due process requires that the evidence be admitted only if the defendant has been "duly advised" of the Informing the Accused information in § 343.305(4). *Id.* at 50.

The Informing the Accused information explicitly tells the person that "[t]he test results or the fact that you refused testing can be used against you in court." Wis. Stat. § 343.305(4). And the standard jury instruction that the trial court used in this case states that "[t]estimony has been received that the defendant refused to furnish a breath sample for chemical analysis. You should consider this evidence along with all other evidence in the case, giving to it the weight you decide it is entitled to receive." (62:170; Wis. JI-Criminal 2663B (2006.)

Lemberger asserts that notwithstanding the statute and jury instruction, and the binding case law, his trial counsel performed deficiently by not objecting when the prosecutor told the jury it should infer Lemberger's guilt from his refusal.

He is wrong. It is well established that a defense attorney is not ineffective for not raising unsettled issues of law. "Counsel is not required to object and argue a point of law that is unsettled." *State v. Maloney*, 2005 WI 74, ¶ 28, 281 Wis. 2d 595, 698 N.W.2d 583 (quoting *State v. McMahon*, 186 Wis. 2d 68, 84, 519 N.W.2d 519 N.W.2d 621 (Ct. App. 1994)). "We think ineffective assistance of counsel cases should be limited to situations where the law or duty is clear such that reasonable counsel should know enough to raise the issue." *Id.* ¶ 29 (quoting *McMahon*, 186 Wis. 2d at 85).

The issue in this case is not even unsettled—it is settled *against* the argument that Lemberger asserts his trial counsel should have made. Lemberger's trial counsel had no duty to make an objection that would have been contrary to settled law.

Lemberger points to no opinion of this Court or the United States Supreme Court that has overruled *Albright*, *Bolstad*, *Crandall*, or *Zielke*. He instead asks this Court to overrule *Albright*, *Bolstad*, and *Crandall*. (Lemberger's Br. 31.) Lemberger's admission that these three cases have not been overruled defeats his ineffective assistance claim. His trial counsel did not perform deficiently by not objecting when settled law would have made an objection fruitless.

While acknowledging that *Albright*, *Bolstad*, and *Crandall* have not been overruled, Lemberger argues that

those three cases "were premised on a holding that there is no right to refuse a breathalyzer test," and "subsequent developments in the law under the Fourth Amendment and the Wisconsin Constitution . . . render that premise untenable." (Lemberger's Br. 31.)

Lemberger's first legal "development" is that the U.S. Supreme Court did not hold that breath tests are searches under the Fourth Amendment until 1989, in *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602 (1989), after *Albright*, *Bolstad*, and *Crandall*. (Lemberger's Br. 30.) But the timing of those particular cases does not matter, for two reasons.

First, the Wisconsin Court of Appeals found that a breath test is a search in 1980, stating that "the taking of a breath sample is a search and seizure within the meanings of the United States and Wisconsin Constitutions." *Milwaukee Cty. v. Proegler*, 95 Wis. 2d 614, 623, 291 N.W.2d 608 (Ct. App. 1980.)

Second, the U.S. Supreme Court held that a blood test is a search long before *Skinner,* in *Schmerber v. California*, 384 U.S. 757, 767 (1966). Despite that ruling, this Court affirmed in *Bolstad*, which concerned a blood test rather than a breath test, that evidence of refusal is admissible to show consciousness of guilt, and that a prosecutor may comment on the refusal. 124 Wis. 2d at 585. This Court recognized no constitutional right to refuse a blood test even though *Schmerber* had held, 19 years earlier, that a blood test is a search.

The second "development" in the law that Lemberger claims renders *Albright*, *Bolstad*, and *Crandall* "untenable," is that *Padley* distinguished between "implied" consent and "actual" consent, and stated that "actual" consent when the

officer requests a sample is required to authorize the taking of a sample. (Lemberger's Br. 30–31.) Lemberger implies that *Padley* interpreted the implied consent law in a manner inconsistent with the interpretation of the law in *Bolstad*, *Crandall*, and *Albright*, and that *Padley's* interpretation is now controlling. (Lemberger's Br. 30–31.)

However, as the State will explain further below, *Padley*'s interpretation of the implied consent law can be read in accord with this Court's longstanding interpretation of the law. And if *Padley*'s explanation and interpretation of the law differs from this Court's, it does not control. The court of appeals could not properly overrule an opinion of this Court or of the court of appeals. *Cook v. Cook*, 208 Wis. 2d 166, 189–90, 560 N.W.2d 246 (1997). If anything in *Padley* were inconsistent with this Court's interpretation of the implied consent law, the circuit court and court of appeals could not follow it. When language in a decision of the court of appeals "is inconsistent with controlling supreme court precedent," a court is "not obligated to apply it" and "must, instead, 'reiterate the law under previous supreme court . . . precedent.'" *State v. Matke*, 2005 WI App 4, ¶ 15, 278 Wis. 2d 403, 692 N.W.2d 265 (quoting *State v. Noll*, 2002 WI App 273, 258 Wis. 2d 573, ¶ 16 n.4, 653 N.W.2d 895).

The third "development" Lemberger cites is that the Supreme Court concluded in *Missouri v. McNeely*, __ U.S. __, 133 S. Ct. 1552 (2013), that "drunk driving cases do not present a per se exigency that justifies a warrantless search in all cases even under an implied consent statute." (Lemberger's Br. 31.)

However, *McNeely* concerned the exigent circumstance exception to the warrant requirement, not the consent

exception. As the court of appeals recognized in *Padley*, "*McNeely* is [not] a consent case," and it "say[s] nothing about the constitutionality of a statute that authorizes a law enforcement officer to require a driver to make a choice about consent." *Padley*, 354 N.W.2d at 575, ¶ 47. And the U.S. Supreme Court has characterized *McNeely* as "referr[ing] approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply." *Birchfield*, 136 S. Ct. at 2185 (citing *McNeely*, 133 S. Ct. at 1565–66.)

The "developments" Lemberger points to establish no constitutional right to refuse a breath test without consequences under the implied consent law, or even cast doubt on the holdings of *Albright*, *Bolstad*, or *Crandall*. Evidence of refusal is admissible at trial, and a prosecutor can argue that refusal shows consciousness of guilt. Lemberger's trial counsel did not perform deficiently by not objecting when the prosecutor did exactly what the law allows.

C. Lemberger has not shown that any deficient performance by his trial counsel caused prejudice.

If a reviewing court determines that a defendant has failed to satisfy either prong of the two-prong test to prove ineffective assistance of counsel, it need not address the other prong. *State v. Mayo*, 2007 WI 78, ¶ 61, 301 Wis. 2d 642, 734 N.W.2d 115 (citing *State v. Tomlinson*, 2001 WI App 212, ¶ 40, 247 Wis. 2d 682, 635 N.W.2d 201). Lemberger has not shown that his trial counsel performed deficiently, so this Court need not address the prejudice prong of the test for ineffective assistance claims.

If this Court does address prejudice, it should conclude that Lemberger also fails to satisfy that prong. Lemberger argues that his trial counsel's failure to object to the prosecutor's comments regarding Lemberger's refusal "created at the very least a reasonable probability that" the outcome of his trial would have been different. (Lemberger's Br. 34.)

But the circuit court recognized that the prosecutor's comments were proper under *Albright* and *Bolstad*. (53.) In light of this binding precedent, the circuit court would not have granted an objection to those comments, so an objection would have accomplished nothing.

Even if Lemberger could somehow show that the circuit court would have sustained an objection to the prosecutor's comments, there is not a reasonable probability that it would have made any difference in Lemberger's trial. The jury still would have known that Lemberger was informed that if he refused, that fact could be used against him in court, and that Lemberger still refused. And the jury still would have been instructed that it could consider the refusal evidence.

During trial, Officer Naylor read the Informing the Accused form to the jury. The jury heard that the form states that "[t]he test results or the fact that you refused testing can be used against you in court." (62:84.) Officer Naylor testified that he asked Lemberger to submit a breath sample, and that Lemberger answered, "Hell no." (62:84.) Officer Ellis also testified that Lemberger refused a breath test by responding, "Hell no." (62:122.) And Lemberger admitted that Officer Naylor read the form to him and asked if he would submit a breath sample, and that he refused. (62:156, 159.) The circuit court then instructed

the jury that "[t]estimony has been received that the defendant refused to furnish a breath sample for chemical analysis. You should consider this evidence along with all other evidence in this case, giving to it the weight you decide that it's entitled to receive." (62:170.)

Lemberger did not assert in his motion for a new trial that his trial counsel was ineffective for not objecting to admission of the evidence that Lemberger refused chemical testing, or to the circuit court instructing the jury that it could consider the evidence of Lemberger's refusal. Trial counsel's "failure" to object to the prosecutor's comments made no conceivable difference at trial.

D. The circuit court correctly denied Lemberger's ineffective assistance claim without a hearing.

If the record conclusively demonstrates that the defendant is not entitled to relief, a circuit court may deny the motion without an evidentiary hearing. *Allen*, 274 Wis. 2d 568, ¶ 9 (citing *Bentley*, 201 Wis. 2d at 310–11; *Nelson*, 54 Wis. 2d at 497–98). The record in this case demonstrates that Lemberger is not entitled to relief. He asserted that his trial counsel performed deficiently by not objecting to comments by the prosecutor that were proper under binding case law. The circuit court would not have sustained the objections. Lemberger has not shown deficient performance or prejudice, and the circuit court properly denied his claim without a hearing.

II. Neither the United States Constitution nor the Wisconsin Constitution grants a right to refuse a proper request for a sample for chemical testing without consequences under Wisconsin's implied consent law.

Lemberger asserts that he had a constitutional right to refuse a request for a breath sample for testing under the implied consent law, and that the State therefore could not properly ask the jury to infer guilt from the refusal. (Lemberger's Br. 22.) Lemberger acknowledges that the United States Constitution grants no right to refuse a breath test without consequences. He urges this Court not to apply *Birchfield*, 136 S. Ct. 2160, in which the Supreme Court concluded that a State may impose criminal penalties and evidentiary consequences for refusing a breath test. (Lemberger's Br. 10–19.) Lemberger claims that the Wisconsin Constitution grants the right to refuse a breath test. (Lemberger's Br. 19–27.) But he points to no Wisconsin case recognizing a right to refuse a breath test without consequences under the Wisconsin Constitution. He instead asks this Court to adopt his version of the court of appeals' interpretation of the implied consent law in *Padley* and *State v. Blackman*, 2016 WI App 69, 371 Wis. 2d 635, 886 N.W.2d 94, and find that under that interpretation, a person has a right to refuse a breath test without consequences. (Lemberger's Br. 21.)

However, this Court "has conformed its interpretation of constitutional search and seizure provisions to the United States Supreme Court's Fourth Amendment jurisprudence." *State v. Banks*, 2010 WI App 107, ¶ 23, 328 Wis. 2d 766, 790 NW.2d 526. Lemberger provides no reason justifying a departure from the Supreme Court's interpretation of the Fourth Amendment in this case.

Lemberger is wrong in asserting that the court of appeals in *Padley* and *Blackman* somehow interpreted the implied consent law in a manner that gives a person a right to refuse a breath test without consequences under the Wisconsin Constitution. It is well established that, by operating a motor vehicle on a Wisconsin highway, a person gives consent to submit a sample for chemical testing when it is properly requested by a law enforcement officer. A person has a constitutional right and a statutory opportunity to withdraw that consent when an officer requests a sample. But there are consequences to withdrawing consent. The person is subject to revocation of his or her operating privilege, and evidence of the refusal may be used in court against the person.

A. The United States Constitution does not grant a right to refuse a breath or blood test without consequences under Wisconsin's implied consent law.

In *Birchfield*, the United States Supreme Court considered the constitutionality of laws that "make it a crime for a motorist to refuse to be tested after being lawfully arrested for driving while impaired." *Birchfield*, 136 S. Ct. at 2166–67. The Court concluded that States may not impose criminal penalties for refusal to submit to a warrantless blood draw. *Id.* at 2186. But the Court also determined that "the Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving." *Id.* at 2184. The Court concluded that States may impose criminal or civil penalties for refusal to submit to a breath test, so the criminal prosecution of one of the petitioners for refusing a breath test did not violate the Fourth Amendment. *Id.* at 2185–86. A person has "no right to refuse" a breath test even if refusal is penalized criminally. *Id.* at 2186.

The Supreme Court in *Birchfield* affirmed the validity of implied consent laws, noting that "[o]ur 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." *Id.* at 2185 (citing *McNeely*, 133 S. Ct. at 1565–66; *Neville*, 459 U.S. at 559). The Court differentiated between the constitutionality of implied consent laws that criminalize refusal to submit to a blood test and those that provide only a civil penalty. The Court concluded that "motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense." *Id.* at 2186. But the Court also said "nothing we say here should be read to cast doubt on" implied consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply. *Id.* at 2185.

Birchfield reinforces the constitutionality of Wisconsin's implied consent law, which imposes only civil penalties for a person's refusal to submit to a test of his or her blood, breath, or urine. A refusal can result in revocation of a person's operating privilege. It cannot result in a criminal penalty. Under *Birchfield*, there is no Fourth Amendment right to refuse a breath test. 136 S. Ct. at 2186. And the Supreme Court noted in *Birchfield* that it had previously referred approvingly to implied consent laws that provide civil penalties for refusal to submit to a blood test, and that nothing the Court said "should be read to cast doubt on" such laws. *Id.* at 2185.

B. Lemberger presents no valid reason for this Court to interpret the Wisconsin Constitution differently than the Supreme Court interpreted the United States Constitution in *Birchfield*.

Lemberger argues that this Court should not apply *Birchfield*, but should instead find that the Wisconsin Constitution provides broader protections for warrantless searches than the United States Constitution provides. (Lemberger's Br. 13.)

But Lemberger points to no compelling or even valid reason for this Court to interpret the Wisconsin Constitution differently than the U.S. Supreme Court has interpreted the United States Constitution. This Court has generally "interpreted Article I, Section 11 to provide the same constitutional guarantees as the Supreme Court has accorded through its interpretation of the Fourth Amendment." *State v. Ferguson*, 2009 WI 50, ¶ 17 n.6, 317 Wis. 2d 586, 767 N.W.2d 187 (citing *State v. Arias*, 2008 WI 84, ¶ 20, 311 Wis. 2d 358, 752 N.W.2d 748). "[C]onforming Wisconsin's search and seizure law to that developed by the Supreme Court under the [F]ourth [A]mendment is not only consistent with the text of Wisconsin's search and seizure provision, its constitutional history and its judicial history, but it is also in accord with sound public policy." *Banks*, 328 Wis. 2d 766, ¶ 23. (quoted source omitted).

Lemberger claims that *Birchfield* conflicts with Wisconsin constitutional principles in five respects. But he points to no reason that justifies not applying *Birchfield* in this case.

Lemberger first points out that the policy of the implied consent statute is "the identification of drunken drivers and their removal from the highways." (Lemberger's Br. 14 (citing *Village of Elm Grove v. Brefka*, 2013 WI 54, ¶ 31, 348 Wis. 2d 282, 832 N.W.2d 121).) He asserts that once a drunk driver has been arrested, he or she is off the highway, so an officer has no reason to rely on consent rather than obtain a warrant. (Lemberger's Br. 14.)

But in the paragraph of *Brefka* immediately preceding the one Lemberger cites, this Court stated that the implied consent law "is meant to 'obtain the blood-alcohol content in order to obtain evidence to prosecute drunk drivers,' which is 'to be used to secure convictions' for operating a motor vehicle while under the influence." *Brefka*, 348 Wis. 2d 282, ¶ 30 (quoting *State v. Brooks*, 113 Wis. 2d 347, 355–56, 335 N.W.2d 354 (1983)). Nothing in *Brefka* or any other Wisconsin decision of which the State is aware provides that an officer cannot properly rely on an arrestee's consent to a blood or breath test but must instead obtain a warrant.

Lemberger argues that after he refused to submit to a breath test, the officer who arrested him "could have—and indeed should have—obtained a search warrant." (Lemberger's Br. 15.) Remarkably, Lemberger seems to be asserting that the officer should have obtained a warrant and had Lemberger's blood drawn forcibly, without his consent. Even assuming that the officer had time to obtain a warrant, the officer obviously was not required to go forward with a blood draw.

Lemberger asserts that "this Court should decline to adopt *Birchfield's* distinction between breath tests and blood tests." (Lemberger's Br. 15.) But that would not benefit Lemberger because the Supreme Court concluded that a

State may punish a refusal to submit to a blood draw under an implied consent statute so long as the punishment is not criminal. *Birchfield*, 136 S. Ct. at 2185–86. And it concluded that a State may punish a refusal to submit to a breath test with either a criminal or civil penalty. *Id.* at 2186. *Birchfield* does not invalidate or even cast doubt on Wisconsin's implied consent law, which imposes only a civil penalty for refusal to submit to either a blood or breath test. In fact, *Birchfield* supports Wisconsin's implied consent law.

Lemberger argues that this Court should decline to adopt *Birchfield* to avoid "different constitutional approaches" for different types of chemical tests. (Lemberger's Br. 15.) But *Birchfield* does not require that breath tests be treated differently than blood tests under Wisconsin's implied consent law. Wisconsin does not impose a criminal penalty for refusal, so *Birchfield* does not render either test unconstitutional. *Birchfield*, 136 S. Ct. at 2185–86.

Lemberger asserts that this Court should decline to adopt *Birchfield* because in *McNeely*, the Supreme Court concluded that officers should obtain a warrant when doing so will not significantly undermine the efficacy of the search. (Lemberger's Br. 16.) But, as discussed above, *McNeely* was concerned with warrantless *nonconsensual* blood draws. As the Court recognized in *Birchfield*, in *McNeely* "the Court pointedly did not address any potential justification for warrantless testing of drunk-driving suspects except for the exception 'at issue in th[e] case,' namely, the exception for exigent circumstances," and "referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply." *Birchfield*, 136 S. Ct. at 2184 (citing *McNeely*, 133 S. Ct. at 1558, 1565–66).

Finally, Lemberger argues that this Court should not apply *Birchfield* because Wisconsin has codified its search incident to arrest law in Wis. Stat. § 968.11. (Lemberger's Br. 16.) But Lemberger does not point to any greater protections under § 968.11 than under the Fourth Amendment, or explain why it matters that Wisconsin has codified its law on searches incident to arrest.

Lemberger has provided no valid reason for this Court to interpret Article I, Section II of the Wisconsin Constitution differently than the Supreme Court interpreted the United States Constitution, and no reason for this Court not to adopt *Birchfield*.

C. *Birchfield* should be applied retroactively to this case.

Lemberger acknowledges the general rule that "newly declared constitutional rules must apply 'to all similar cases pending on direct review.'" (Lemberger's Br. 17 (citing *State v. Foster*, 2014 WI 131, ¶ 41, 360 Wis. 2d 12, 856 N.W.2d 847 (additional citation omitted.)) But he argues that this Court should not apply *Birchfield* retroactively for three reasons. None of the three reasons has even arguable merit.

Lemberger argues that this case is not similar to *Birchfield* because Wisconsin's implied consent law imposes only a civil penalty, not criminal punishment, for a refusal to submit to chemical testing. (Lemberger's Br. 17–18.)

Lemberger is correct regarding Wisconsin imposing a civil rather than a criminal penalty for refusal. But that is hardly a reason not to adopt *Birchfield*'s conclusions that the Fourth Amendment does not require an officer to obtain a warrant before requesting a breath test that a defendant has no right to refuse a breath test without consequences, and

that an officer need not obtain a warrant in order to request a blood test so long as a refusal is subject to only civil penalties. *Birchfield*, 136 S. Ct. at 2186. Lemberger points to no differences between the implied consent laws at issue in *Birchfield* and Wisconsin's implied consent law, other than the penalty for refusing. Wisconsin imposes only a civil, rather than a criminal penalty. If enforcing a breath test with *criminal* penalties does not violate the Constitution, surely imposing mere *civil* penalties is constitutional. As the Court said in *Birchfield*, "nothing we say here should be read to cast doubt on" implied consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply. *Id.* at 2185.

Lemberger argues that at the time of trial "he had at very least a good faith belief that his withdrawal of consent from a breathalyzer test was immunized as a matter of state and federal constitutional law." (Lemberger's Br. 18.)

Lemberger does not explain how he could have had such a belief, since *Albright*, *Bolstad*, and *Crandall* all state the opposite, and no case from this Court or the Supreme Court has even hinted that a person has a constitutional right to refuse a breath test.

Finally, Lemberger argues that retroactive application of *Birchfield* is inappropriate because *Birchfield* was decided after his trial, and the issue on appeal is whether his trial counsel was ineffective for not objecting to the prosecutor's statements during trial. (Lemberger's Br. 18–19.)

The State agrees that the issue in this case concerns whether Lemberger's trial counsel was ineffective. As the State has explained, Lemberger's trial counsel was not ineffective for not making an objection that would have been

contrary to settled law. But that is no reason not to follow *Birchfield*, whose interpretation of implied consent laws is not in any way at odds with this Court's interpretation of Wisconsin's implied consent law. Under *Bolstad*, *Crandall*, and *Birchfield,* there is no right to refuse a breath test under the implied consent law without consequences.

D. Wisconsin's Constitution does not grant a right to refuse a breath or blood test without consequences under Wisconsin's implied consent law.

1. By operating a motor vehicle on a highway in Wisconsin, a person consents to submit to a proper request for a sample under the implied consent law, unless the person withdraws that consent.

Wisconsin's implied consent provides that any person who operates a motor vehicle on a Wisconsin highway consents to submit a sample when a law enforcement officer properly requests a sample under the implied consent law:

> (2) IMPLIED CONSENT. 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, for the purpose of determining the presence or quantity in his or her blood or breath, of alcohol, controlled substances, controlled substance analogs or other drugs . . . when requested to do so by a law enforcement officer under sub. (3) (a) or (am) or when required to do so under sub. (3) (ar) or (b). Any such tests shall be administered upon the request of a law enforcement officer.

Wis. Stat. § 343.305(2).

This Court explained the workings of the implied consent law in *State v. Anagnos*, 2012 WI 64, 341 Wis. 2d 576, 815 N.W.2d 675, as follows:

> Wisconsin Statute § 343.305, known as the implied consent law, provides that any person who drives on the public highways of this state is deemed to have consented to chemical testing upon request by a law enforcement officer. Upon arrest of a person for violation of an OWI-related statute, a law enforcement officer may request the person to provide a blood, breath, or urine sample for chemical testing. Wis. Stat. § 343.305(3)(a). At the time of the request for a sample, the officer must read to the person certain information set forth in § 343.305(4), referred to as the Informing the Accused form.
>
> If the person submits to chemical testing and the test reveals the presence of a detectable amount of a restricted controlled substance or a prohibited alcohol concentration, the person is subjected to an administrative suspension of his operating privileges. Wis. Stat. § 343.305(7)(a). . . .
>
> If, on the other hand, the person refuses to submit to chemical testing, he is informed of the State's intent to immediately revoke his operating privileges. Wis. Stat. § 343.305(9)(a).

Id. ¶¶ 21–23.

A person has a general constitutional right to withdraw consent to a search. *See e.g., United States v. Carter*, 985 F.2d 1095, 1097 (D.C. Cir. 1993) (recognizing a "constitutional right to withdraw one's consent to a search"); *United States v. Dyer*, 784 F.2d 812, 816 (7th Cir. 1986) (same). Wisconsin's implied consent law recognizes this right by permitting drivers to withdraw the consent they give by operating a motor vehicle on a Wisconsin highway. And a law enforcement officer who requests a sample from a driver under the implied consent law is required to inform the

driver of the consequences for withdrawing consent. Wis. Stat. § 343.305(4).

A person who is conscious and capable of withdrawing consent when an officer requests a sample has an opportunity to withdraw consent and refuse to provide a sample. But there are consequences for withdrawing consent. The choice is to submit, and thereby affirm the consent the person has already given, or withdraw that consent and face consequences.

This Court has long recognized that under the implied consent law, a person gives consent to chemical testing by his or her conduct. In some cases, this Court has concluded that a person gives consent to testing by obtaining a driver's license. In *Scales v. State*, 64 Wis. 2d 485, 494, 219 N.W.2d 286 (1974), this Court concluded 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, consent[s] to submit to chemical tests for intoxication under statutorily determined circumstances."

In *State v. Neitzel*, 95 Wis. 2d 191, 201, 289 N.W.2d 828 (1980), this Court explained that by applying for a driver's license, a person has "waived whatever right he may otherwise have had to refuse to submit to chemical testing." This Court added, "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.*

In other cases, this Court has concluded that a driver gives consent to chemical testing by operating a motor vehicle on a Wisconsin highway. In *State v. Nordness*, 128 Wis. 2d 15, 27–28, 381 N.W.2d 300 (1986), this Court noted that the implied consent law says that "*[a]ny person who drives* or operates a motor vehicle upon the public highways of this state . . . shall be deemed to have given consent to one or more tests. . . ." *Id.* at 27–28. This Court concluded that this provision "declares legislative policy, namely, that those who drive consent to chemical testing." *Id.* at 28.

In *State v. Zielke*, 137 Wis. 2d 39, 403 N.W.2d 427 (1987), this Court recognized that "consent is implied as a condition of the privilege of operating a motor vehicle upon state highways." *Id.* at 48 (citing *Neitzel*, 95 Wis. 2d at 201). "By implying consent, the statute removes the right of a driver to lawfully refuse a chemical test." *Id.* (citing *Crandall*, 133 Wis. 2d at 255–57). "The implied consent law attempts to overcome the possibility of refusal by the threat of an adverse consequence: license revocation." *Id.* (citing *Neitzel*, 95 Wis.2d at 203–05, 289 N.W.2d 828). "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." *Id.* at 47.

In *Washburn County v. Smith*, 2008 WI 23, 308 Wis. 2d 65, 746 N.W.2d 243, this Court stated that "[u]nder the Implied Consent Law, the defendant was deemed to have consented to the test requested by Deputy Sutherland when the defendant decided to drive upon a Wisconsin highway." *Id.* ¶ 40 n.36 (citing Wis. Stat. § 343.305(2)).

The cases concluding that a driver gives consent to chemical testing when the driver operates a motor vehicle on

a Wisconsin highway are consistent with the plain language of the implied consent law. But whether this Court has found consent by applying for or receiving a driver's license, or by driving on a Wisconsin highway, it has always recognized that a driver gives consent to submit to a request for a sample for chemical testing by his or her conduct, before a law enforcement officer request a sample.

2. *Padley* should not be read as reinterpreting Wisconsin's implied consent law.

Under the implied consent law, a person "is deemed to have given consent" to testing "when requested to do so by a law enforcement officer." Wis. Stat. § 343.305(2). This Court has consistently recognized that a person gives consent to chemical testing by obtaining a driver's license or by operating a motor vehicle on a Wisconsin highway. But Lemberger argues that only "actual" consent given at the time a law enforcement officer requests or requires a sample authorizes the taking of a sample, and that a person has a constitutional right to refuse to give "actual" consent. (Lemberger's Br. 21–22.)

Lemberger bases his argument on *Padley,* 354 Wis. 2d 545, where the court of appeals addressed 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. *Padley*, 354 Wis. 2d 545, ¶ 10. The court of appeals found this provision constitutional. *Id.* ¶¶ 48, 54, 60.

The court of appeals also addressed the workings of the implied consent law, to clarify "confusion" with "how the law works." *Id.* ¶ 25. The court's explanation was dicta,

unnecessary to the court's holding. But Lemberger relies on *Padley's* dicta as somehow interpreting the implied consent law differently than this Court has interpreted it. He asks this Court to adopt his version of *Padley's* interpretation of the implied consent law. (Lemberger's Br. 21.)

In *Padley*, the court of appeals stated that there are two types of consent under the implied consent law: the "implied consent" a person gives when operating a motor vehicle in Wisconsin, and "actual consent" given when a law enforcement officer requests a sample. *Padley,* 354 Wis. 2d 545, ¶ 26. The court explained that as a condition of being licensed to drive a vehicle on a Wisconsin public roadway, all drivers give implied consent to an evidentiary test of their blood, breath, or urine. *Id.* The court said that implied consent "means that, in situations specified by the legislature, if a driver chooses not to consent to a blood draw (effectively declining to comply with the implied consent law), the driver may be penalized." *Id.*

The court of appeals stated that "a proper implied consent law authorizes law enforcement to present drivers with a difficult, but permissible, choice between consent or penalties for violating the implied consent law." *Id.* ¶ 28. The court added that:

> [T]he implied consent law is explicitly designed to allow the driver, and not the police officer, to make the choice as to whether the driver will give or decline to give *actual* consent to a blood draw when put to the choice between consent or automatic sanctions. Framed in the terms of "implied consent," choosing the "yes" option affirms the driver's implied consent and constitutes actual consent for the blood draw. Choosing the "no" option acts to withdraw the driver's implied consent and establishes that the driver does not give actual consent. Withdrawing consent by choosing the "no" option is an unlawful action,

> in that it is penalized by "refusal violation" sanctions, even though it is a choice the driver can make.

Id. ¶ 39.

In *Blackman*, the court of appeals explained that in *Padley*, it affirmed what this Court has long held—when an officer requests a sample under the implied consent law, the person has the choice of submitting, or refusing and withdrawing the consent that the person gave by operating a motor vehicle on a Wisconsin highway. *Blackman*, 371 Wis. 2d 635, ¶ 10 (citing *Padley*, 354 Wis. 2d 545, ¶¶ 26, 38).

Lemberger urges this Court to "adopt the *Padley*/*Blackman* interpretation of Wisconsin's implied consent statute." (Lemberger's Br. 21.) He argues that *Padley* "flatly rejected the contention that 'implied consent alone can serve as a valid exception to the warrant requirement,'" and stated that "'any search conducted must be based on a warrant, *actual* consent, or another exception to the warrant requirement.'" (Lemberger's Br. 21–22 (quoting *Padley*, 354 Wis. 2d 545, ¶¶ 37, 53).) Lemberger argues that by refusing to submit to a breath test, he did not give actual consent, and that his refusal was constitutionally privileged. (Lemberger's Br. 22.)

The court of appeals' explanation of the implied consent law in *Padley* is generally consistent with this Court's interpretation of the law, particularly if the term "actual consent" is viewed as meaning "submission." It is true that when a law enforcement officer requests a sample under Wis. Stat. § 343.305(3)(a) or (am) from a person who is conscious and capable of withdrawing the consent he or she gave by operating a motor vehicle on a Wisconsin highway, the person has a choice. He or she can either affirm the

consent he or she impliedly gave by operating a motor vehicle on a Wisconsin highway and submit to the request for a sample, or refuse to submit and thereby withdraw his or her implied consent. *See e.g., Anagnos*, 341 Wis. 2d 576, ¶¶ 23–24.

But *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).

Lemberger's interpretation of *Padley* would also contradict myriad cases from this Court and the court of appeals. Both this Court and the court of appeals have consistently recognized that by operating a motor vehicle on a Wisconsin highway, a person gives voluntary consent to submit to an officer's request for a sample when arrested for impaired driving. In several cases, the courts have recognized that consent is implied, and that officers may take samples from someone who cannot "actually" consent.

In *State v. Bohling*, 173 Wis. 2d 529, 494 N.W.2d 399 (1993) (abrogated on other grounds by *McNeely*, 133 S. Ct. at 1552, 1558 n.2), this Court recognized that samples may be taken from unconscious drivers. The Court reasoned that "the Fourth Amendment warrant requirement is relaxed when the activity at issue constitutes a serious risk to public safety," and that "persons engaging in such activities have a

reduced expectation of privacy." *Id.* at 540 (citing *Skinner*, 489 U.S. at 627). The Court explained:

> Likewise, in the context of driving on public highways, public safety concerns reduce a driver's expectation of privacy. In fact, the Wisconsin legislature explicitly recognizes this reduced expectation of privacy. It has concluded that all drivers lawfully arrested for drunk driving have impliedly consented to blood sampling, sec. 343.305(2), Stats., and that warrantless blood samples may be taken from unconscious drivers based solely on probable cause. Section 343.305(3)(b), Stats.

Id. at 541 (footnotes omitted).

In *State v. Piddington*, 2001 WI 24, 241 Wis. 2d 754, 623 N.W.2d 528, this Court determined that an officer complied with the implied consent law when he read the Informing the Accused warnings to a driver who was severely deaf. *Id.* ¶ 2. This Court concluded that whether the driver "subjectively understood the warnings is irrelevant," *id.* ¶ 32 n.19, and "not part of the inquiry." *Id.* ¶ 55.

In *State v. Disch*, 129 Wis. 2d 225, 385 N.W.2d 140 (1986), this Court determined that if a driver is unconscious or otherwise incapable of withdrawing consent, an officer need not even read the Informing the Accused form to the person. The officer can simply order that a sample be taken for testing. *Id.* at 234.

In *Proegler*, 95 Wis. 2d at 623, the court of appeals recognized that consent "is not optional, but is an implied condition precedent to the operation of a motor vehicle on Wisconsin public highways." The court added that "[t]his statutory scheme does not contemplate a choice, but rather establishes that a defendant will suffer the consequences of

revocation should he refuse to submit to the test after having given his implied consent to do so. The defendant's consent is not at issue." *Id.* at 624.

In *State v. Wintlend*, 2002 WI App 314, 258 Wis. 2d 875, 655 N.W.2d 745, the court of appeals concluded that consent to testing is given at the time a person obtains a driver's license or operates a motor vehicle on a highway in Wisconsin, and that additional consent is not required when a law enforcement officer requests that the person submit to testing. *Id.* ¶ 12.

A requirement of "actual" voluntary consent when an officer requests a sample would be inconsistent with these and many Wisconsin cases. It would also mean that the implied consent law somehow has effect only if a person who likely is intoxicated gives valid voluntary consent to give a sample when facing the threat of revocation of his or her operating privilege.

In *Padley*, the court of appeals intended to explain how the implied consent law works. 354 Wis. 2d 545, ¶ 25. The court cited cases including *Neitzel* and *Zielke*, which recognized that "consent is implied as a condition of the privilege of operating a motor vehicle upon state highways," and that "[b]y implying consent, the statute removes the right of a driver to lawfully refuse a chemical test." *Zielke*, 137 Wis. 2d at 48 (citing *Neitzel*, 95 Wis. 2d at 201).

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. This Court should decline to adopt Lemberger's interpretation of the implied consent

law. Instead, it should clarify that *Padley* and *Blackman* should be read not as reinterpreting the implied consent law, but simply explaining the law as this Court has historically interpreted it.

3. A prosecutor may properly comment on a person's refusal to submit to chemical testing under the implied consent law.

Lemberger argues that the prosecutor violated his right to due process and his right against self-incrimination by referring to his refusal and telling the jury it could infer that he refused because he was conscious of his guilt. (Lemberger's Br. 23–27.) Lemberger asserts that Wisconsin and federal cases have determined that "a prosecutor may not seek an adverse inference from a defendant's invocation of his Fourth Amendment right to be free from unreasonable searches and seizures." (Lemberger's Br. 24.) (emphasis omitted).

Lemberger cites no case that has held that a prosecutor may not comment on a defendant's refusal to submit to chemical testing by withdrawing his or her implied consent. And the U.S. Supreme Court has determined that a prosecutor's comments to the jury about a defendant's refusal under an implied consent law do not violate the Constitution.

In *Neville*, the Supreme Court concluded that a prosecutor could properly comment on a defendant's refusal under South Dakota's implied consent law, which operates in the same fashion as Wisconsin's law. The Court explained that South Dakota's implied consent statute "declares that any person operating a vehicle in South Dakota is deemed to

have consented to a chemical test of the alcoholic content of his blood if arrested for driving while intoxicated." 459 U.S. at 559. "[T]he South Dakota statute permits a suspect to refuse the test, and indeed requires police officers to inform the suspect of his right to refuse." *Id.* at 559–60. The statute provides for revocation of a person's operating privilege for refusal, and "allow[s] the refusal to be used against the defendant at trial." *Id.* at 560 (citations omitted.) The Court concluded that a State could constitutionally use the defendant's refusal against him at trial, stating that a "refusal to take a blood-alcohol test, after a police officer has lawfully requested it, is not an act coerced by the officer, and thus is not protected by the privilege against self-incrimination." *Id.* at 564.

In *McNeely*, the Supreme Court recognized that implied consent laws generally provide penalties for refusal, and that a refusal can be used in court against the defendant: "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. 1552 (citing *Neville*, 459 U.S. at 554, 563–64 (additional citation omitted.))

In *Birchfield*, the Supreme Court noted that in *McNeely* and *Neville*, it "referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply." *Birchfield*, 136 S. Ct. at 2185 (citing *McNeely*, 133 S. Ct. at 1565–1566; *Neville*, 459 U.S. at 560). The Court stated that "nothing we say here should be read to cast doubt on" *McNeely* or *Neville*. *Id.*

Lemberger argues that this Court should not rely on *Neville* because it was decided before the Supreme Court concluded that a breath test is a search under the Fourth Amendment. (Lemberger's Br. 26.) But *Neville* involved a blood test, and when it was decided, the Supreme Court had already determined in *Schmerber,* 384 U.S. at 767, that a blood test is a search.

Lemberger also argues that, in *Neville*, the Supreme Court found the prosecutor's comments on the defendant's refusal constitutional because South Dakota's implied consent law allowed such comments. (Lemberger's Br. 27.) But the Supreme Court obviously did not premise its conclusion that the prosecutor's comments were constitutional on whether a state statute allowed such comments.

Lemberger asserts that his situation is different from the facts of *Neville* because the Wisconsin Constitution grants a right to refuse a warrantless search. (Lemberger's Br. 27.) For this premise, Lemberger relies on *Banks*, 328 Wis. 2d 766. But *Banks* did not hold that a prosecutor cannot comment on a defendant's refusal to submit to a breath test under the implied consent law. Such a holding would have run afoul of *Albright*, *Bolstad*, and *Crandall*.

In *Banks*, the court determined that a prosecutor could not properly encourage the jury to draw a negative inference from a defendant's refusal to voluntarily submit a DNA sample. *Id.* ¶¶ 20, 24.

But Lemberger, like all drivers in Wisconsin, voluntarily consented to submit to chemical testing when he operated a motor vehicle on a Wisconsin highway. When a

law enforcement officer requested a sample of his breath and asked him to affirm his consent, Lemberger opted to refuse the request and withdraw his consent. When the prosecutor referred to Lemberger's refusal, and asked the jury to infer consciousness of guilt therefrom, he commented on Lemberger's choice to revoke the voluntary consent he had already given. An officer's request to submit a DNA sample, in contrast, implicates no such implied consent.

III. Although the court of appeals properly concluded that Lemberger forfeited his appellate arguments, this Court should decide this case on the merits.

The court of appeals concluded that Lemberger forfeited his arguments by not asserting in the circuit court that binding Wisconsin cases had been silently overruled. *State v. Lemberger*, No. 2015AP1452-CR, 2016 WL 1552158, ¶ 8 (Wis. Ct. App. Apr. 14, 2016) (unpublished).

Lemberger argues that the court of appeals erred in concluding that he forfeited his arguments. (Lemberger's Br. 36–38.) He also asserts that even if he did forfeit his arguments, this Court should address the issues he raises. (Lemberger's Br. 38 n.14.)

The State maintains that the court of appeals correctly determined that Lemberger forfeited his arguments that controlling Wisconsin precedent has been overruled, and that his trial counsel was therefore ineffective for not objecting to the prosecutor's comments. As the court of appeals recognized, Lemberger did not even mention the three controlling cases in the circuit court, and did not argue that they have been silently overruled. *State v. Lemberger*, 2016 WL 1552158, ¶ 8.

The State recognizes that this Court has discretion to consider the issues raised in this case notwithstanding that Lemberger forfeited them. "[W]hen an issue involves a question of law, has been briefed by the opposing parties, and is of sufficient public interest to merit a decision, this court has discretion to address the issue." *State v. Moran*, 2005 WI 115, ¶ 31, 284 Wis. 2d 24, 700 N.W.2d 884 (citation omitted).

This Court granted review in this case, presumably to address the merits of the issues Lemberger raises. Whether a person has a constitutional right to refuse a breath test under the implied consent law is a matter of public interest sufficient to warrant an opinion by this Court. The State therefore does not ask this Court to decide the case on the forfeiture issue.

CONCLUSION

For the reasons explained above, the State respectfully requests that this Court affirm the court of appeals' decision which affirmed the judgment of conviction and the order denying Lemberger's motion for a new trial.

Dated this 11th day of January, 2017.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 10,343 words.

_____
MICHAEL C. SANDERS
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 11th day of January, 2017.

_____
MICHAEL C. SANDERS
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