Supreme Court of Wisconsin

Case No. 15-AP-1452CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

GARY F. LEMBERGER,

Defendant-Appellant-Petitioner.

ON PETITION FOR REVIEW FROM A DECISION OF THE WISCONSIN COURT OF APPEALS AFFIRMING JUDGMENTS AND ORDERS OF THE CIRCUIT COURT OF DANE COUNTY, THE HONORABLE WILLIAM E. HANRAHAN PRESIDING.

REPLY BRIEF OF
DEFENDANT-APPELLANT-PETITIONER

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TABLE OF CONTENTS

Page

ARGUMENT 1

I. This Court Should Recognize That A Search Incident To Lawful Arrest Is Not A Categorical Exception To The Warrant Requirement In All Cases Involving Breath Tests. 1

II. The State Concedes That A Person Has A Constitutional And Statutory Right To Refuse To Provide A Chemical Sample Upon Request. ... 3

III. The Decisions In *Albright*, *Bolstad*, and *Crandall* Assume The Absence Of A Constitutional Right To Refuse Chemical Testing Which The State Concedes Exists..... 5

IV. Lemberger Adequately Pleaded A Claim of Ineffective Assistance Of Counsel. 7

A. The Obligation To Object To The Prosecutor's Comments Was Not "Unsettled" At The Time Of Trial. 7

B. The Prejudice To Lemberger From Trial Counsel's Deficient Performance Was Not Diminished By The Existence Of Refusal Evidence In The Record. 8

CONCLUSION 9

CASES CITED

Birchfield v. North Dakota,
136 S. Ct. 2160 (2016) 3

Bumper v. North Carolina,
391 U.S. 543 (1968) 4

Florida v. Royer,
460 U.S. 491 (1983) 4

Fuller v. Oregon,
417 U.S. 40 (1974) 5

Griffin v. California,
380 U.S. 609 (1965) 5, 9

Hinton v. Alabama,
134 S. Ct. 1081 (2014) 8

Missouri v. McNeely,
133 S. Ct. 1552 (2013) .....*passim*

Skinner v. Railway Labor Executives Ass'n,
489 U.S. 602 (1989) 1, 6

State v. Albright,
98 Wis. 2d 663,
298 N.W.2d 196 (Ct. App. 1980)..... 5, 6, 7

State v. Banks,
2010 WI App 107,
328 Wis. 2d 766, 790 N.W.2d 526.....*passim*

State v. Bolstad,
124 Wis. 2d 576, 370 N.W.2d 257 (1985)..... 6

State v. Crandall,
133 Wis. 2d 251, 394 N.W.2d 905 (1986) 6

State v. Faust,
2004 WI 99,
274 Wis. 2d 183, 682 N.W.2d 371,
cert. denied, 543 U.S. 1089 (2005) 1

State v. Kennedy,
2014 WI 132,
359 Wis. 2d 454, 856 N.W.2d 834..... 2, 3, 7

State v. Maloney,
2005 WI 74,
281 Wis. 2d 595, 698 N.W.2d 583..... 7, 8

State v. Phillips,
218 Wis. 2d 180,
577 N.W.2d 794 4

State v. Williams,
2002 WI 94,
255 Wis. 2d 1, 646 N.W.2d 834..... 4

United States v. Carter,
985 F.2d 1095, (D.C. Cir. 1993) 4

United States v. Jackson,
390 U.S. 570 (1968) 5

United States v. Moreno,
233 F.3d 937 (7th Cir. 2000)..... 1, 4

Village of Elm Grove v. Brefka,
2013 WI 54,
348 Wis. 2d 282, 832 N.W.2d 121..... 2

Wilke v. Robbins,
551 U.S. 537, 555-56 (2007)..... 5

STATUTES

Wis. Stat. § 343.305(3)(a) 3

Wis. Stat. § 343.305(4)..... 3

CONSTITUTIONAL PROVISIONS

WIS. CONST., Art. I, § 11..... 1

ARGUMENT

The State does not contest (1) that the Constitution forbids unreasonable searches and seizures, *see State v. Faust*, 2004 WI 99, ¶ 32, 274 Wis. 2d 183, 682 N.W.2d 371, *cert. denied*, 543 U.S. 1089 (2005), (2) that the administration of a breathalyzer test is a search, *see Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 616-17 (1989), (3) that a search is unreasonable unless supported by a warrant or an exception to the warrant requirement, *see Missouri v. McNeely*, 133 S. Ct. 1552, 1558 (2013), and that (4) a person need not consent to a search in the absence of an applicable warrant exception. *United States v. Moreno*, 233 F.3d 937, 941 (7th Cir. 2000).

Although the State takes issue with various aspects of Lemberger's argument, it nevertheless concedes that a person "has a general constitutional right to withdraw consent to a search" and even recognizes that a "person has a constitutional right…to withdraw that consent when an officer requests a sample." *See* Resp. Br. at 17, 25. These admissions support Lemberger's position, and this Court should reverse the court of appeals.

I. This Court Should Recognize That A Search Incident To Lawful Arrest Is Not A Categorical Exception To The Warrant Requirement In All Cases Involving Breath Tests.

Lemberger identified in his first brief (App. Br. at 13-16) several compelling policy reasons that justify a broader interpretation under Article I, § 11 of the Wisconsin Constitution in the context of the administration of evidentiary

breath tests.[1] These considerations recognize that a categorical search-incident-to-arrest exception in all drunk driving cases involving breath tests would allow the exception to swallow the important rule that a warrant should be secured when it can reasonably be obtained. *Missouri v. McNeely*, 133 S. Ct. 1552, 1561 (2013); *State v. Kennedy*, 2014 WI 132, ¶ 30, 359 Wis. 2d 454, 856 N.W.2d 834.

The State does not dispute (nor could it) that a central purpose of Wisconsin's implied consent laws is to identify drunk drivers and remove them from the highways. *Village of Elm Grove v. Brefka*, 2013 WI 54, ¶ 31, 348 Wis. 2d 282, 832 N.W.2d 121. Nor can the State seriously dispute that a drunk driver—once arrested—has been both identified and removed from the highway. While the State correctly notes that *Brefka* also acknowledged the importance of blood-alcohol content evidence in securing convictions, it ignores the fundamental point that this evidence should be collected either after *obtaining a warrant* when it is practical to obtain one, or following freely-given consent.

Additionally, the State's brief fails to address that application of a categorical search-incident-to-arrest exception in all breath test cases undermines the long-standing recognition that a breath test is a "search" subject to constitutional requirements. If the Court adopts such an approach, the contents of a person's lungs in Wisconsin will be categorically open for the taking in all drunk driving arrests.

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[1] While it is true that this Court has historically interpreted the Fourth Amendment and Article I § 11 in tandem, *see*, *State v. Kozel*, 2017 WI 3 ¶ 40 n.6, ___ Wis. 2d ___, ___ N.W.2d ___, this Court has extended greater protections where important constitutional values were at issue. *See*, *e.g.*, *State v. Eason*, 2001 WI 98, ¶ 60, 245 Wis. 2d 206, 629 N.W.2d 625; *Hoyer v. State*, 180 Wis. 407, 193 N.W. 89 (1923).

Cf. Birchfield v. North Dakota, 136 S. Ct. 2160, 2195 (2016) (Sotomayor, J., *dissenting*).

Moreover, such an approach would render superfluous several provisions of Wisconsin's implied consent statute. For example, that statute contemplates that an officer who arrests a suspect for drunk driving "may *request* the person to provide" a breath or blood sample. Wis. Stat. § 343.305(3)(a) (emphasis added). And, the officer must provide certain information regarding the consequences of a suspect's *refusal*. *Id*., § 343.305(4). If the contents of a person's lungs were always available to the police as a search incident to arrest, these statutory provisions would be largely superfluous, as there would be no need for the police to ask for a sample in the first instance.

Finally, the State's argument ignores the advancements in technology have greatly reduced the time necessary to secure a warrant, "resulting in more time for law enforcement officials to obtain a warrant." *Kennedy*, 2014 WI 132 at ¶ 30, *citing McNeely*, 133 S. Ct. at 1562. Indeed, the uncontroverted evidence in the record of this case confirms that there was at least 20 minutes, *plus* the delay between arrest and transportation to the intoximeter room during which time law enforcement could have obtained a warrant, but did not. (R.62, App. 157-58 at 79:12-80:17, App. 160 at 82:4-8). And, the arresting officer in this case freely acknowledged that he could have obtained a warrant, though he chose not to. (*Id*., App. 165 at 93:10-24).

II. The State Concedes That A Person Has A Constitutional And Statutory Right To Refuse To Provide A Chemical Sample Upon Request.

Although consent is a recognized exception to the warrant requirement, *see State v. Williams*, 2002 WI 94, ¶ 19,

255 Wis. 2d 1, 646 N.W.2d 834, that consent must be freely and voluntarily given in order to justify a warrantless search. *See, e.g., Bumper v. North Carolina*, 391 U.S. 543, 548-49 (1968); *State v. Phillips*, 218 Wis. 2d 180, 196, 577 N.W.2d 794 ("a warrantless search conducted pursuant to consent which is 'freely and voluntarily' given does not violate the Fourth Amendment"). Mere acquiescence to a claim of lawful authority is not consent. *Bumper*, 391 U.S. at 549. *See also Florida v. Royer*, 460 U.S. 491, 497 (1983).

The State candidly acknowledges (Resp. Br. at 25) that a person "has a general constitutional right to withdraw consent to a search," and more specifically concedes that a person "has *a constitutional right* and a statutory opportunity *to withdraw that consent when an officer requests a sample*." *See* Resp. Br. at 17 (emphases added). *See also State v. Banks*, 2010 WI App 107, ¶ 24, 328 Wis. 2d 766, 790 N.W.2d 526; *United States v. Moreno*, 233 F.3d 937, 941 (7th Cir. 2000); *United States v. Carter*, 985 F.2d 1095, 1097 (D.C. Cir. 1993).

The State qualifies its concession by suggesting repeatedly that there is no such right "without consequences." *See* Resp. Br. at 5, 13, 16-17, 22, 24. But, the State mischaracterizes Lemberger's argument. There may be consequences that result from the exercise of a constitutional right, but those consequences do not diminish the existence of that right in the first instance—a constitutional right the State now acknowledges.[2] As shown in Lemberger's brief, however, the proper inquiry is whether the consequences that are challenged—in this case the prosecutor's comments on withdrawal of consent—impermissibly burden that constitutional right. *See* App. Br. at 23-27.

[2] For example, a defendant who considers exercising the constitutional right to remain silent risks the "consequence" of relinquishing the ability to testify on his or her own behalf.

Many cases establish that a prosecutor's comment on a defendant's exercise of his constitutional rights is improper because it allows the jury to "draw inferences of lack of honesty from invocation of a privilege deemed worthy of enshrinement in the Constitution." *Banks*, 2010 WI App 107 at ¶ 24. *See also Griffin v. California*, 380 U.S. 609, 614 (1965) (prosecutor may not comment on defendant's failure to testify); *United States v. Jackson*, 390 U.S. 570, 572 (1968) (statute making death penalty available only for defendants who went to trial "impose[d] an impermissible burden upon the exercise of a constitutional right"); *Wilke v. Robbins*, 551 U.S. 537, 555-56 (2007) (government may not retaliate for exercising First, Fifth, and Sixth Amendment rights); *Fuller v. Oregon*, 417 U.S. 40, 54 (1974) (collecting cases invalidating statutes that placed a penalty on the exercise of a constitutional right).

III. The Decisions In *Albright, Bolstad,* and *Crandall* Assume The Absence Of A Constitutional Right To Refuse Chemical Testing Which The State Concedes Exists.

The State faults Lemberger for identifying no single opinion of this Court or the U.S. Supreme Court that expressly overruled *State v. Albright*, 98 Wis. 2d 663, 298 N.W.2d 196 (Ct. App. 1980), *State v. Bolstad*, 124 Wis. 2d 576, 370 N.W.2d 257 (1985), or *State v. Crandall*, 133 Wis. 2d 251, 394 N.W.2d 905 (1986). *See* Resp. Br. at 10. The State ignores Lemberger's central argument (App. Br. at 29) that the premise on which *Albright* and its progeny rest is that "Wisconsin drivers have no constitutional right to refuse to take the breathalyzer." *Albright*, 98 Wis. 2d at 669.

Yet, the State now concedes that a "person *has a constitutional right and a statutory opportunity* to withdraw

…consent when an officer requests a sample." Resp. Br. at 17 (emphasis added).[3] The State's own admission supports Lemberger's showing that the central premise of *Albright* and its progeny is untenable.

Moreover, the State discounts the numerous developments in search and seizure jurisprudence in the 37 years since *Albright*. *See* Resp. Br. at 11-13. Among those developments are the universal recognition of breath tests as searches (App. Br. at 10-11, 30),[4] the recognition by Wisconsin courts that "implied" consent does not categorically constitute actual consent to a search (App. Br. at 20-22), and *McNeely's* reiteration of the importance of obtaining a warrant when it is reasonably possible to do so. (App. Br. at 16). *See also McNeely*, 133 S. Ct. at 1562; *Kennedy*, 2014 WI 132 at ¶ 30.

In sum, the State acknowledges that a person now "has a constitutional right… to withdraw…consent when an officer requests a sample." Because *Albright* and its progeny assumed that no such right existed, those decisions should no longer be followed.

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[3] As discussed above, the State qualifies its concession by suggesting that—although a person "has a constitutional right…to withdraw consent when an officer requests a sample" (Resp. Br. at 17), there is no constitutional right to refuse *without consequences*. *Id*. But, as Lemberger showed above in Point II, the proper inquiry is whether the prosecutor's comments on refusal impermissibly *burdened* Lemberger's constitutional right.

[4] The State cites a 1980 court of appeals decision recognizing that a breath test was a search. *See* Resp. Br. at 11. While that decision had precedential value at the time, neither this Court nor the U.S. Supreme Court had definitively established a breath test as a search at the time of *Albright, Bolstad,* or *Crandall*.

IV. Lemberger Adequately Pleaded A Claim of Ineffective Assistance Of Counsel.

A. The Obligation To Object To The Prosecutor's Comments Was Not "Unsettled" At The Time Of Trial.

The State responds to Lemberger's claims of ineffective assistance of counsel by stating that counsel need not "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. The State's argument misses the mark for at least three reasons.

First, the court of appeals in *Banks* addressed and rejected the very argument the State urges here. In *Banks*, the court of appeals held that trial counsel was ineffective for failing to object to comments by the prosecutor that a defendant had refused to consent to a submit to a DNA sample. As here, the State suggested that *Maloney* precluded a claim of ineffective assistance of counsel because there was no specific Wisconsin case that had addressed the defendant's claim. The court of appeals rejected the State's argument in part because the U.S. Supreme Court and other federal courts had recognized that "it is a violation of the defendant's right to due process for a prosecutor to comment on a defendant's failure to consent to a warrantless search." *Id*. at ¶ 24. This is the precise argument Lemberger advances in this case, and for these reasons, the State's invocation of *Maloney* similarly fails.

Second, whatever strength the State's argument regarding *Maloney* may have had in *Banks*, by the time of Lemberger's trial in this case, any remaining merit had evaporated. Unlike *Banks* in which no Wisconsin appellate case had addressed claims regarding a prosecutor's comments on refusal to consent to a search, by the time of Lemberger's trial, *Banks* had clearly established that the prosecutor's

comments on refusal to consent to a warrantless search were impermissible. *Banks*, 2010 WI App 107 at ¶ 24.

Finally, as of the time of Lemberger's trial, the U.S. Supreme had made clear that an attorney's "ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*." *Hinton v. Alabama*, 134 S. Ct. 1081, 1089 (2014). *Hinton*, *Banks*, as well as the decisions on which *Banks* rested, were readily available to Lemberger's trial counsel, and it was constitutionally deficient performance to fail to rely on those authorities to object to the prosecutor's comments.

B. The Prejudice To Lemberger From Trial Counsel's Deficient Performance Was Not Diminished By The Existence Of Refusal Evidence In The Record.

In responding to Lemberger's showing of prejudice from trial counsel's failure to object to the prosecutor's comments, the State suggests that the jury would have learned that Lemberger refused the breath test in any event. *See* Resp. Br. at 14. The State's argument is at odds with the U.S. Supreme Court's holding in *Griffin v. California*, 380 U.S. 609 (1965). In *Griffin*, the high court examined the impropriety of a prosecutor's comment on a defendant's refusal to testify. It had been argued that the jury would likely infer guilt from a refusal to testify in any event, making prosecutorial comment irrelevant and immune from challenge. In rejecting this argument, the Supreme Court admonished:

> What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another.

Id. at 614. *See also Banks*, 2010 WI App 107 at ¶ 24-25 (trial counsel should have objected to prosecutor's comments during closing on refusal to consent to search).

Thus, even had the jury learned that Lemberger withheld his consent to the search, whatever inferences it may have drawn, "given no help from the [prosecutor]," *Griffin*, 380 U.S. at 614, were of no moment. In contrast, the prosecutor's repeated commentary was inappropriate, and trial counsel's failure to object constituted ineffective assistance of counsel. *Banks*, 2010 WI App 107 at ¶ 25.

CONCLUSION

For all of the foregoing reasons, as well as all of the reasons in Lemberger's first brief, this Court should reverse the court of appeals.

Dated this 25th day of January, 2017.

Respectfully submitted,

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I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,427 words.

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