STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal Nos. 17 AP 280-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KAITLIN C. SUMNICHT,

Defendant-Appellant.

REPLY BRIEF OF DEFENDANT-APPELLANT

ON APPEAL FROM A FINAL ORDER ENTERED ON DECEMBER 19, 2016, IN THE CIRCUIT COURT FOR WINNEBAGO COUNTY, BRANCH I, THE HONORABLE THOMAS J. GRITTON PRESIDING.

Respectfully submitted,

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ARGUMENT

I.

SUMNICHT DID NOT PROVIDE VOLUNTARY CONSENT TO THE EVIDENTIARY CHEMICAL TEST OF HER BLOOD.

The State's response to the first issue in this appeal is flawed for three reasons: first, it mischaracterizes the standard of review; second, it either misstates or ignores the caselaw regarding the interaction between the Fourth Amendment and the implied consent law; third, its interpretation of the factual record improperly shifts the burden of proof to Sumnicht.

A. The State mischaracterizes the standard of review—voluntariness is a question of constitutional fact, reviewed *de novo*.

The State's brief asserts that "whether a person gives consent is a matter of historical fact," and that the circuit court's findings should not be upset unless they are against the great weight and clear preponderance of the evidence.[1] The State then argues that "[t]his Court should uphold the trial court's findings of fact that Sumnicht voluntarily consented[.]"[2] ***State v. Phillips***, which is cited by the

[1] State's brief, 3.
[2] ***Id.***

State, says that the voluntariness of consent is a question of "constitutional fact" subject to a two-part analysis.[3] First, questions of historical fact are reviewed with deference to the circuit court.[4] But the voluntariness of consent involves the application of constitutional principles to those facts, and is reviewed *de novo*.[5]

The circuit court's finding that Sumnicht voluntarily consented to a blood test was not a finding of historical fact, but a conclusion that involved the application of constitutional principles to the factual record before the court. The State's suggestion that the voluntariness of consent is a factual finding is incorrect and misleading.

B. The State improperly relies on the minority holding in *State v. Brar* for the proposition that all citizens provide constitutionally-sufficient consent to blood testing by driving a vehicle.

The State's brief advances a theory that Sumnicht voluntarily consented to a blood test by conduct—perhaps by obtaining a driver's license, or by driving on public roads.[6] This theory is unsupported by the caselaw.

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[3] ***State v. Phillips***, 218 Wis. 2d 180, 195, 577 N.W.2d 794 (1998).
[4] ***Id.***
[5] ***Id.***
[6] State's brief, 5–7.

The State cites two sources of authority for its theory—***State v. Neitzel***, and Justice Roggensack's opinion in ***State v. Brar***.[7] Neither case supports the State's position.

Neitzel, from 1980, dealt with a challenge to the revocation of the defendant's driving privileges under Wis. Stat. § 343.305, the implied consent law.[8] The defense argued that Neitzel should have been afforded an attorney prior to taking or refusing a chemical test.[9] The court ruled against Neitzel, holding that:

> [B]y reason of the implied consent law, a driver, when he applies for and receives an operator's license, submits to the legislatively imposed condition on his license that, upon being arrested and issued a citation for driving under the influence of an intoxicant…he consents to submit to the prescribed chemical tests. He applies for and takes his license subject to the condition that a failure to submit to the chemical test will result in the sixty-day revocation of his license[.][10]

Here, the State cites a portion of the above quotation from ***Neitzel*** for the proposition that "[b]y reason of the implied consent law, a driver … consents to submit to the prescribed chemical tests."[11] This reading of ***Neitzel*** is wrong for two reasons. First, ***Neitzel*** did not discuss the voluntariness of consent for the simple reason that Neitzel did not consent to anything.[12] Neitzel refused a

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[7] State's brief, 5–7; ***State v. Neitzel***, 95 Wis. 2d 191, 289 N.W.2d 828 (1980); ***State v. Brar***, 2017 WI 73.
[8] ***Neitzel***, 95 Wis. 2d at 192–93.
[9] ***Id***., 193.
[10] ***Id***. (emphasis supplied).
[11] State's brief, 5, *citing* ***Neitzel***, 95 Wis. 2d at 193 (ellipses by State.)
[12] ***Neitzel***, 95 Wis. 2d at 196.

breath test, and the issue was whether Neitzel should be subject to statutory penalties for that refusal.[13] ***Neitzel*** did not address the Fourth Amendment's interaction with the implied consent law because that question was irrelevant to the facts of the case.

Second, and more importantly, the State simply misinterprets ***Neitzel***. As the emphasized portions of the above quotation show, the ***Neitzel*** court did not hold that citizens of Wisconsin who obtain an operator's license *have consented* to future chemical tests. It held that citizens of Wisconsin, who are given the privilege of a driver's license, receive that privilege *conditionally*, with the understanding that under certain circumstances, they must consent to evidentiary testing *or* lose the privilege to drive.[14]

It is one thing to say that "if you do A, you must do B." It is quite another to say that "if you do A, you must do B *or* C." The ***Neitzel*** court uses the latter logical construction, but the State selectively quotes the opinion to make it seem like the court used the former. When ***Neitzel*** is read in full, it is entirely consistent with the framework set forth in ***State v. Padley*** and reaffirmed in ***State v. Blackman***: the implied consent law does not compel consent to

[13] ***Id***., at 193.
[14] ***Id***.

testing, it requires drivers to choose between consenting to testing or revocation of their driver's license.[15]

In support of its theory that Sumnicht provided voluntary consent by driving her vehicle, the State also cites to ***State v. Brar*** no less than six times.[16] But the State's citations are all to Justice Roggensack's "lead" opinion, which gathered the full support of only two other justices.[17] A legal theory supported by a minority of three justices does not carry the force of precedent. In ***State v. King***, the Court of Appeals noted that "[i]t is a general principle of appellate practice that a majority must have agreed on a particular point for it to be considered the opinion of the court."[18] If no "theoretical overlap" exists between the opinions such that a majority of four justices can be formed, "the only binding aspect of the fragmented decision … is its specific result."[19]

Justice Roggensack's opinion was joined in full only by Justices Gableman and Ziegler.[20] Justice Kelly wrote a concurring opinion, in which he agreed that—based on Brar's interaction with

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[15] ***State v. Padley***, 2014 WI App 65, ¶¶ 26–27, 354 Wis. 2d 545, 849 N.W.2d 867, ***State v. Blackman***, 2017 WI 77, ¶¶ 54–67.
[16] State's brief, 5–7.
[17] Id.; *see* ***Brar***, 2017 WI 73, ¶¶ 1–42.
[18] ***State v. King***, 205 Wis. 2d 81, 88–89, 555 N.W.2d 189 (1996), *citing* ***State v. Dowe***, 120 Wis. 2d 192, 194, 352 N.W.2d 660, 662 (1984) (internal punctuation omitted).
[19] ***State v. Deadwiller***, 2013 WI 75, ¶ 30, 350 Wis. 2d 138, 834 N.W.2d 362 (internal citations and punctuation omitted.)
[20] ***Brar***, 2017 WI 73, ¶¶ 1–42.

the arresting officer—he had provided voluntary consent.[21] But Justice Kelly disagreed with Justice Roggensack's opinions about the implied consent law, writing *inter alia*:

> I cannot join any part of the court's discussion of implied consent because it misunderstands how our implied consent law functions, it says "consent" implied by law is something voluntarily given when such a thing is impossible, it introduces a destructive new doctrine that reduces constitutional guarantees to a matter of legislative grace, and it fails to properly distinguish between (a) express consent, (b) consent implied by conduct, and (c) "consent" implied by law.[22]

Justice Rebecca G. Bradley wrote separately to note that she agreed only with the mandate of the court and joined the first section of Justice Kelly's opinion, which argued that the lead opinion should have stopped the analysis after determining that Brar provided voluntary consent during his interaction with the arresting officer.[23] Justice Abrahamson dissented, joined by Justice Ann Walsh Bradley, disagreeing both with the lead opinion's determination that Brar provided voluntary consent and with its interpretation of the implied consent law.[24]

While a majority of five justices agreed with the narrow mandate of the court, only three justices supported the State's theory

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[21] ***Id***., ¶ 47.
[22] ***Id.***, ¶ 44.
[23] ***Id.***, ¶ 43.
[24] ***Id***., ¶¶ 87–148.

that a person can voluntarily consent to future blood testing by applying for a license or driving a car.[25] Three justices explicitly rejected that proposition, and Justice Rebecca Bradley demurred, agreeing only with the mandate and with Justice Kelly that the Court should not have reached the issue.[26] Thus, the portions of Justice Roggensack's lead opinion dealing with the implied consent law are not the opinion of the Court and do not carry any precedential value.

In sum, the State supports its theory about "implied consent" by misreading ***Neitzel*** and by relying heavily on a non-precedential minority opinion. In contrast, Sumnicht's initial brief thoroughly explained the interaction between Wisconsin's implied consent law and the concept of voluntary consent, citing to ***State v. Marshall***, ***State v. Padley***, and ***State v. Blackman***, where the Wisconsin Supreme Court acknowledged the same argument that the State makes here, but proceeded to analyze the voluntariness of Blackman's consent at the time of his conversation with the police, rather than simply deeming voluntary consent to have occurred because he travelled on a highway.[27] Other than citing to the

[25] State's brief, 7; ***Brar***, ¶¶ 1–42.
[26] ***Brar***., ¶¶ 94, 44, 43
[27] Defendant's brief, 14–17; ***State v. Marshall***, 2002 WI App 73, ¶ 13, 251 Wis. 2d 408, 642 N.W.2d 571; ***Padley, supra***, ¶¶ 26–27; ***Blackman***, ***supra***, ¶¶ 54–67.

minority opinion in ***Brar***, the State does not advance any challenge to the defendant's assessment of the caselaw.

As a final note, the State did not raise this legal theory before the circuit court, and it was therefore not addressed in Sumnicht's initial brief.[28] The Court of Appeals ordinarily does not consider issues which were not first raised in the trial court.[29]

C. The factual record does not contain clear and convincing evidence that Sumnicht provided voluntary consent to search, as opposed to acquiescence to a display of authority.

When the State chooses to rely on consent, it must offer clear and convincing evidence of the voluntariness of that consent.[30] It must meet this burden by the production of "positive evidence" of the defendant's voluntary choice.[31] Mere compliance with the request of a police officer is not sufficient to show voluntary consent.[32]

The facts of this case are thoroughly discussed in the defendant's initial brief. The State argues that the circuit court was correct when it held that Sumnicht "loses just because of this

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[28] *See* 25:1–7.
[29] ***Brown County. v. Dep't of Health and Soc. Services***, 103 Wis. 2d 37, 42, 307 N.W.2d 247 (1981).
[30] ***Blackman***, ¶ 54.
[31] ***Gautreaux v. State***, 52 Wis. 2d 489, 492, 190 N.W.2d 542 (1971).
[32] *See, e.g.*, ***State v. Johnson***, 2007 WI 32, ¶ 18–19, 299 Wis. 2d 675, 729 N.W.2d 182.

[Informing the Accused] form in and of itself[.]"[33] But in making this pronouncement, the circuit court shifted the burden to Sumnicht to prove that her consent was involuntary. Judge Gritton said that if Sumnicht "gets up and testifies … then it becomes a credibility issue obviously, but under the circumstances here ... I don't find out how I would find this isn't a voluntary consent."[34]

Sumnicht had no burden to present evidence. The evidence presented by the State was essentially limited to the fact that Sumnicht did not say no when asked to take a blood test. This evidence is not enough to enable a court to distinguish voluntary consent from acquiescence to police authority. The circuit court was wrong to put the burden on Sumnicht to prove involuntary consent. When the record is insufficient, the party with the burden to produce positive, clear, and convincing evidence should lose.

II.

SUMNICHT CLEARLY AND UNEQUIVOCALLY WITHDREW ANY CONSENT TO THE ANALYSIS OF HER BLOOD.

The State answers Sumnicht's second issue by arguing that citizens have no privacy interest in the information contained in their

[33] State's brief 10, *citing* 43:20–21.
[34] 43:20–21 (*sic.*).

blood and a limited window to withdraw consent once it has been given. Both propositions are incorrect.

A. The State argues that citizens have no privacy interest whatsoever in the information contained in their blood after it has been removed from their bodies. This radical proposition runs contrary to established Supreme Court caselaw.

The State argues that "[o]nce Sumnicht's blood was legally drawn, she no longer had a privacy interest in her extracted blood."[35] This claim is wholly without support in the law.

The State claims that recent U.S. Supreme Court cases have focused on the "taking of the blood"—as opposed to its testing or analysis—as "the 'search' that matters."[36] While this claim is dubious,[37] even if the issue had not been mentioned in recent cases, there is an on-point case that stands in direct opposition to the State's claim—***Skinner v. Ry. Labor Executive's Ass'n***.[38] In ***Skinner***, the U.S. Supreme Court discussed "penetrating beneath the skin" as an infringement on a privacy interest, but also held that "[t]he ensuing chemical analysis of the sample … is a further invasion [of]

[35] State's brief, 14.
[36] Id., 12.
[37] Most notably, ***Birchfield v. North Dakota*** did discuss the information contained within the sample of blood—in addition to the piercing of the skin—as being a relevant factor when assessing the privacy interests at stake. 136 S.Ct. 2160, 2178 (2016).
[38] 489 U.S. 602, 109 S.Ct. 1402 (1989).

privacy[.]"[39] Although Sumnicht cited to ***Skinner*** in her initial brief, the State did not attempt to distinguish it in its brief.[40]

Since ***Skinner*** was decided in 1989, the argument in favor of recognizing a privacy interest in the information contained in a blood sample has only become stronger. Advances in chemical testing and DNA technology now allow for a staggering amount of information to be developed from a biological sample. For example, the commercial service "23andMe" can deduce from a small saliva sample information including what ancestral groups you are descended from, where your ancestors lived thousands of years ago, living people that may be related to you, and your disposition for over 65 biological traits, from blood clots, Alzheimer's, and Parkinson's disease to the existence of a "unibrow" and the ability to detect the odor of asparagus.[41] And the New York Times recently reported on police agencies' growing use of genetic phenotyping—the use of a DNA profile to determine physical traits—to generate physical descriptions or even sketches of suspects.[42]

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[39] ***Id.***, 489 U.S. at 616.

[40] Ordinarily, arguments not responded to are deemed conceded, *see* ***Charolais Breeding Ranches, Ltd., v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) citing ***State ex. rel. Blank v. Gramling***, 219 Wis. 196, 262 N.W. 614, 615 (1935).

[41] 23andMe, Compare Our DNA Tests, https://www.23andme.com/compare-dna-tests/ (last visited Sept. 13, 2017).

[42] Andrew Pollack, *Building a Face, and a Case, on DNA*, N.Y. Times, Feb. 23, 2015, *available at* https://www.nytimes.com/2015/02/24/science/building-face-and-a-case-on-dna.html

Under the State's theory, after the government collects blood from an allegedly impaired driver, it is not limited to testing for signs of impairment. Any blood sample collected by the police under any circumstances would become government property, and could constitutionally be retained by the government indefinitely, used for any purpose, or even sold to third parties. This state of affairs—for good reason—is not permitted by the caselaw.

B. Sumnicht had an absolute right to withdraw consent to a search which had not yet been completed.

Because Sumnicht had a privacy interest in her blood, the law permitted her to assert that privacy interest and request that no further testing be done. Sumnicht's brief set forth the well-established line of cases holding that consent to search may be modified, limited, or withdrawn at any time.[43] The State's brief does attempt to distinguish this caselaw.[44]

The State argues that Sumnicht's opportunity to withdraw consent to testing "expired" or "passed" after her blood was drawn.[45] The State cites ***State v. Rydeski*** for the holding that a narrow window exists to submit or refuse testing for purposes of license

[43] Sumnicht's brief, 23–24.
[44] Again, arguments not responded to are ordinarily deemed conceded. ***Charolais***, ***supra***.
[45] State's brief, 15–16.

revocation under § 343.305.[46] But ***Rydeski***, like ***Neitzel***, only addressed whether statutory penalties had been properly imposed after a refusal.[47] It did not address voluntary consent or the withdrawal of consent.

The State agrees that "[i]f officers begin a consensual search of an individual's home, and the individual decides to revoke consent, the officers would obviously have to discontinue the search[.]"[48] But the State likens Sumnicht's case to a situation where officers located drugs before consent was revoked, and argues that the officers "would not simply put the drugs back[.]"[49]

Although the State does not cite any authority for this point, its argument invokes the "plain-view" doctrine. This doctrine permits the police, while conducting other lawful activities, to seize evidence of a crime that is in "plain view."[50] However, the plain-view doctrine requires that the "incriminating character" of evidence be "immediately apparent" to the police for a seizure of the evidence to be justified.[51] Police lawfully present in a home could seize marijuana sitting in plain view on a table. But if the consent to search

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[46] Id., s*ee* ***State v. Rydeski***, 214 Wis. 2d 101, 109, 571 N.W.2d 417 (Ct. App. 1997).
[47] ***Rydeski***, 214 Wis. 2d at 104.
[48] State's brief, 16.
[49] ***Id***.
[50] *See* ***Horton v. California***, 496 U.S. 128 (1990).
[51] ***Id.***, at 137.

was revoked, the police would not be permitted to seize a sealed and nondescript container from the table on the way out.

In the context of a blood draw, there is nothing immediately apparent about an untested vial of blood that conveys its incriminating character to the police. An incriminating vial of blood looks the same as an exculpatory vial of blood. After Sumnicht withdrew her consent to testing, the plain-view doctrine cannot justify the government's continued possession of, and testing of, the blood sample.

CONCLUSION

For the reasons stated above, together with those in her initial brief, Sumnicht respectfully requests that this Court reverse the circuit court's order denying her suppression motions, and remand the matter for further proceedings.

Dated at Madison, Wisconsin, _____ 2017.

Respectfully submitted,

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CERTIFICATION

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

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