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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appellate Case No. 2017AP000888

In the matter of the refusal of Dustin R. Willette:

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

DUSTIN R. WILLETTE,

Defendant-Appellant

# BRIEF OF DEFENDANT-APPELLANT

On Appeal from Brown County Circuit Court,
the Honorable Thomas J. Walsh, presiding
Trial Court Case No. 16TR10066

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### Statutes

343.305(2) Implied consent. Any person who is on duty time with respect to a commercial motor vehicle or drives or operates a motor vehicle upon the public highways of this state, or in those areas enumerated in s. 346.61, 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, or any combination of alcohol, controlled substances, controlled substance analogs and 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. The law enforcement agency by which the officer is employed shall be prepared to administer, either at its agency or any other agency or facility, 2 of the 3 test sunder sub. (3) (a), (am), or (ar), and may designate which of the tests shall be administered first.

343.305(8)(b)1- Within 10 days after the notification under par. (a), or, if the notification is by mail, within 13 days, excluding Saturdays, Sundays and holidays, after the date of the mailing, the person may request, in writing, that the department review the administrative suspension. The review procedure is not subject to ch. 227. Unless the hearing is by remote communication mechanism or record review, the department shall hold the hearing on the matter in the county in which the offense allegedly occurred or at the nearest office of the department if the offense allegedly occurred in a county in which the department does not maintain an office. The department, upon request of the person, may conduct a hearing under this paragraph by telephone, video conference, or other remote communication mechanism or by review of only the record submitted by the arresting officer and written arguments. The department shall hold a hearing regarding the administrative suspension within 30 days after the date of notification under par. (a). The person may present evidence and may be represented by counsel. The arresting officer need not appear at the administrative hearing unless subpoenaed under s. 805.07 and need not appear in person at a hearing conducted by remote communication mechanism or record review, but he or she must submit a copy of his or her report and the results of the chemical test to the hearing examiner.

2. The administrative hearing under this paragraph is limited to the following issues:

a. The correct identity of the person.
b. Whether the person was informed of the options regarding tests under this section as required under sub. (4).

bm. Whether the person had a prohibited alcohol concentration or a detectable amount of a restricted controlled substance in his or her blood at the time the offense allegedly occurred.

c. Whether one or more tests were administered in accordance with this section.
d. If one or more tests were administered in accordance with this section, whether each of the test results for those tests indicate the person had a prohibited alcohol concentration or a detectable amount of a restricted controlled substance in his or her blood.
e. If a test was requested under sub. (3) (a), whether probable cause existed for the arrest.
f. Whether the person was driving or operating a commercial motor vehicle when the offense allegedly occurred.
g. Whether the person had a valid prescription for methamphetamine or one of its metabolic precursors or gamma-hydroxybutyric acid or delta-9-tetrahydrocannabinol in a case in which subd. 4m. a. and b. apply.

## CASES

## ISSUE PRESENTED FOR REVIEW

**Did the seizing officer have cause to seize and relocate the Defendant for Fields without knowledge of him driving?**

The Trial Court answered: Yes

The Appellant answers: No

**Did the State Satisfy its burden at the refusal hearing to prove that the Defendant was the driver of the vehicle in question?**

The Trial Court answered: Yes

The Appellant answers: No

**Did the Trial Court commit clear error when it found the requisite causation required to arrest?**

Trial Court did not address this issue.

The Appellant answers: Yes

**Did the Defendant improperly refuse Chemical Testing?**

Trial Court Answers: Yes

The Appellant Answers: No

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is requested so that both parties can verbally illustrate their interpretations of law as they apply to the facts of this case. Publication is suggested in order to give further guidance to the bench and bar as to the requirements for refusal findings and elements that must be met prior to arrest.

## STANDARD OF REVIEW

"The application of the implied consent statute to found facts is a question of law that we review de novo." See Olen v. Phelps, 200 Wis.2d 155, 160, 546 N.W.2d 176, 180 (Ct.App.1996).

## STATEMENT OF CASE

On January 23rd, 2017 the Appellants counsel was present in Brown County Circuit Court for a hearing on a refusal allegation in an OWI arrest. At the January 23rd hearing, Willette's counsel argued the refusal before the Circuit Court citing as issues; 1. lack of required cause to arrest, 2. lack of proof that the defendant was the driver, and 3. Lack of a refusal.

On February 24th, 2017 the Defendant was found to have improperly refused chemical testing. (R. 29). Following this finding, the Defendant petitioned the Circuit Court for an Order Staying his sentence pending appeal. The request to stay his Sentence was granted. This Appeal follows.

## STATEMENT OF THE FACTS:

On Sunday October 2nd, shortly after 5:24 a.m. Officer Hughes of the Oneida Police Department responded to a call at a gas station that "a vehicle had stopped in front of Oneida one stop, which is 3120 Parkerland drive, and a male exited the vehicle" (R. 27, 5)

Upon arrival Officer Hughes noted no driver of the vehicle in question at the scene. Hughes on a hunch apprehended a suspect walking nearly a mile away. That Suspect informed Officer Hughes of his name, address and why he was in town. Officer Hughes asked the suspect if he had been driving, which he denied. (R. 11, 5 at PICT0033_2016.10.02_05.34.54)

Regardless, of having no information indicating that the suspect she questioned was the driver, the Defendant was transported in the back of a police cruiser and brought to the scene where he was administered field sobriety testing that was improperly instructed and ultimately passed. (R. 11, 5 at PICT0033_2016.10.02_05.34.54) (R. 11 , 5 PICT0004_2016.10.02_05.50.04)

Without proof that the Defendant was the driver of the vehicle in question, and regardless of passing his field sobriety testing, he was placed under arrest and read the informing the accused from required under Wisconsin's Implied consent statute. ( R. 11, 5- PICT0005_2016.10.02_06.02.24)When asked if he would consent to one or more chemical tests of his blood the Defendant responded he didn't understand what the right

answer was and asked the officer to re-read the form. ( R. 11, 5-PICT0005_2016.10.02_06.02.24) After the form was read again, the Defendant indicated that he still did not understand what he was supposed to do. When the defendant informed the Officer a second time that he did not know the right answer and would like legal clarification the form was marked as a refusal ( R. 11, 5-PICT0005_2016.10.02_06.02.24)

**ARGUMENT**

*Did the seizing officer have cause to seize and relocate the Defendant for Field Sobriety Tests without knowledge of him driving?*

Simply put at the time of relocating the defendant, the seizing officer had no idea that Mr. Willette was the driver of the vehicle in question. The Factual Findings of the Trial Court are clearly erroneous and the clear errors with legal consequence are easy to see.

In this case, Mr. Willette was seized some distance from the scene of the vehicle involved in the suspected OWI.

At the time of relocating the Defendant back to the scene via backseat of a police cruiser the officers did not have any information indicating that he was the DRIVER of the vehicle in question.

There was a radio broadcast describing an occupant of the vehicle that Officer Hughes admits to not hearing. (R. 28, 3)

When asked how she knew the description of the defendant Officer Hughes indicated there was a recording. But admits she never listened to it.

"Q. Okay. Do you have any statement from him at all?

A. The phone. He called on a recorded line at the Oneida police department.

Q. Okay. And have you reviewed that recording?

A. No."

Similar to the way that she stated she knew the Defendant was the driver from the surveillance video that she admittedly didn't watch until after the arrest. (R. 29, 3)

Officer Hughes, also testified she could see the Defendant exiting the vehicle from the driver side on the surveillance video she watched sometime after the events of this day. The Trial court disagreed with this testimony: "Mr. Fredrickson said he really didn't see any demonstrated testimony - - or any demonstrated video of the defendant leaving the car. Quite frankly, when I viewed it, I didn't see that either." (R. 29, 3) This fact is critical as Officer Hughes during her investigation plainly says "we know you were driving the vehicle because we have video of you driving" (R. 11 , 5) PICT0004_2016.10.02_05.50.04 at timestamp :10- :31

In representing there is a video showing him driving the officer is expressly communicating a misstatement of fact that the Defendant was seen on video driving, this was her sole basis for believing he was the driver and relocating the Defendant to the scene. It is critical to realize she admits that she had not viewed the recording referenced at this point in time. (R. 11 , 5) PICT0004_2016.10.02_05.50.04 at timestamp :10- :31

It is also error to conclude that there was an admission by the Defendant that he *drove* a similar vehicle. The Court found in error: "He had been drinking to such a point that he had no idea where he

was, that he was ***driving*** a vehicle that looked like that one." (R 29, 5)

Factually the Defendant was in town for a wedding admitted to drinking and not having knowledge of the area. (R. 11, 5 at PICT0033_2016.10.02_05.34.54 )

Factually, the defendant never once stated that he was driving at all. Rather, he states: "he is sure not driving and took a cab." (R. 11, 5 at PICT0033_2016.10.02_05.34.54 :01-:45 ) The conversation continues and the Defendant denies knowing his vehicle was there or that he drove at all. (R. 11, 5 at PICT0033_2016.10.02_05.34.54)

The record is entirely devoid of a single fact that indicates that the Defendant was the driver prior to relocation to the vehicle from where he was walking. Without information that he was the driver the continued seizure and relocation of his person was unlawful.

Known to the officers at the time of forcibly relocating the Defendant was merely a description of the vehicle. Without evidence in the record to support this finding of fact it must be overturned as it is clear error. The record is devoid of an identification of a DRIVER prior to the relocation of Mr. Willette. Devoid of any indication he was the driver. And shows he passed field sobriety testing.

*Did the Trial Court commit clear error when it found the requisite causation required to arrest?*

The Trial Court found: "I am satisfied that the officer conducted these tests appropriately and the clues as indicated were observed." (R. 29, 7)

This finding is erroneous as in the record is the recording of the actual field tests. From the recordings it is clear that neither of the two cues that the officer testified to are present in the nine step walk and turn test. (Stepping off the line and bad turn) Specifically the Defendant passes this test as he performs it just as the officer instructed. (R. 11 , 5 PICT0004_2016.10.02_05.50.04 at timestamp 2:49 – 4:15)

Further, The HGN test was administered improperly. The Court found: "I don't know the Details of what one looks for in HGN test or Testing, but - - **I know they look for nystagmus**, but I couldn't see into the eye from the video." ( R. 29, 6)

However when asked, Officer Hughes indicated she was unaware of the different types of Nystagmus.

"Q. Do you recall your instructions to him prior to administering that test?

A. I would have to refer to my report.

Q. Would it surprise you if I told you the only thing that you told him was to follow your pen?

A. Yes.

Q. Are you familiar with the different types of Nystagmus?

A. No" (R. 28, 5)

The Error of the court here is clear as well. If the seizing officer isn't aware of the types of Nystagmus then it is not possible for her to identify them. This Test was also administered with deficient instructions.

During the HGN: Officer Hughes failed to give any meaningful instruction at all. Instruction's to keep your head still and only follow the pen with your eyes are critical to the determination of cause to arrest.

"Q. Would it surprise you if I told you the only thing that you told him was to follow your pen?

A. Yes."

-Testimony of Officer Hughes regarding HGN instructions (R. 28, 5)

Here the officer implies through testimony there are additional instructions that should have been given to properly administer this test. Regardless the only instruction given to a Defendant while facing the headlights of a cruiser was "follow my pen with your eyes". (R. 11, 5 PICT0004_2016.10.02_05.50.04 at timestamp 1:06 – 1:31)

Without critical instructions it is impossible to perform this test correctly. Worse yet Officer Hughes candidly admits she is not aware of the different types of nystagmus. For these reasons this test must also be struck.

Simply put, the totality of the circumstances do not amount cause to arrest in this case. (R. 11, 5)

*Did the Defendant improperly refuse Chemical Testing?*

Willetts's Consent was implied by the Legislature and affirmed by the Wisconsin Supreme Court as a matter of law. State v. Brar, 2017 WI 73 This consent was never expressly revoked or implicitly revoked.

"Prior cases from the court of appeals could be read as casting doubt on the maxim that a person may consent through conduct or by implication. For example, the court of appeals in Padley reasoned that consent that arises under Wisconsin's implied consent law is different from consent that is sufficient in and of itself under the Fourth Amendment. State v. Padley, 2014 WI App 65, ¶ 25, 354 Wis.2d 545, 849 N.W.2d 867.

Specifically, the court reasoned that "actual consent to a blood draw is not 'implied consent,' but rather a possible result of requiring the driver to choose whether to consent under the implied consent law." Id. This reasoning implies a distinction between implied consent and consent that is sufficient under the Fourth Amendment. **Such a distinction is incorrect as a matter of law.**[8]

*4 ¶20 Stated more fully, and contrary to the court of appeals' reasoning in Padley, consent can manifest itself in a number of ways, including through conduct. Cf. Florida v. Jardines, —— U.S. ——, 133 S.Ct. 1409, 1415-16, 185 L.Ed.2d 495 (2013); Marshall v. Barlow's, Inc., 436 U.S. 307, 313, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978). The use of the word "implied" in the idiom "implied consent" is merely descriptive of the way in which an individual

gives consent. It is no less sufficient consent than consent given by other means.

**11¶21 An individual's consent given by virtue of driving on Wisconsin's roads, often referred to as implied consent, is one incarnation of consent by conduct. Wis. Stat. § 343.305(2) (An individual who "drives or operates a motor vehicle upon the public highways of this state ... is deemed to have given consent to one or more tests of his or her breath, blood or urine.").** "By reason of the implied consent law, a driver ... consents to submit to the prescribed chemical tests."[9] State v. Neitzel, 95 Wis.2d 191, 193, 289 N.W.2d 828 (1980); see also State v. Reitter, 227 Wis.2d 213, 225, 595 N.W.2d 646 (1999) ("The implied consent law provides that Wisconsin drivers are deemed to have given implied consent to chemical testing as a condition of receiving the operating privilege."). And, as a plurality of the Supreme Court explained in Missouri v. McNeely, —— U.S. ——, 133 S.Ct. 1552, 1566, 185 L.Ed.2d 696 (2013), "all 50 States have adopted implied consent laws that require motorists, **as a condition of operating a motor vehicle** within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense." The "consent" to which this court in Neitzel and the Supreme Court in McNeely refer is consent sufficient under the Fourth Amendment—not some amorphous, lesser form of consent. See, e.g., People v. Hyde, 393 P.3d 962, 968 (Colo. 2017) ("Hyde's statutory consent also satisfied the consent exception to the Fourth Amendment warrant requirement. This conclusion flows from recent Supreme Court precedent.").

¶22 Furthermore, the Supreme Court's assertion that an individual's consent to a search under the Fourth Amendment "may

be fairly inferred from context" was given with specific reference to an implied consent law. Birchfield, 136 S.Ct. at 2185 (reasoning, "consent to a search need not be express but may be fairly inferred from context.... Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply."). Of course, the "context" to which the Supreme Court was referring was an individual driving on the roads of a state that had enacted an implied consent law.

*5 1213¶23 Therefore, lest there be any doubt, consent by conduct or implication is constitutionally sufficient consent under the Fourth Amendment.[10] We reject the notion that implied consent is a lesser form of consent. Implied consent is not a second-tier form of consent; it is well-established that consent under the Fourth Amendment can be implied through an individual's conduct.[11]

State v. Brar, 2017 WI 73, ¶¶ 19-23

The Record is completely devoid of any factual conduct that expressly or implicitly can be construed as a revocation of consent that is under *Brar* given by the implicit action of driving in Wisconsin. ( R. 11, 5- PICT0005_2016.10.02_06.02.24)

"Certainly Mr. Fredrickson is correct when he argued that there was no specific answer of yes or no that was given." (R. 29, 7) "… "and again you can hearing the defendant indicating that he doesn't know what the right answer is" (R. 29, 8)

Further, at the time of being read the implied consent form Willette is factually being compelled to make a statement against his

own interest that can be used against him in court. This is in violation of his constitutional right to remain silent while in custody.

"This law enforcement agency now wants to test one or more samples of your breath, blood or urine to determine the concentration of alcohol or drugs in your system. If any test shows more alcohol in your system than the law permits while driving, your operating privilege will be suspended. If you refuse to take any test that this agency requests, your operating privilege will be revoked and you will be subject to other penalties. The test results or the fact **that you refused testing can be used against you in court.**" State v. Brar, 2017 WI 73, ¶ 52

This is done while Willette is in custody and prior to Miranda warnings being read. Willette is entitled to the privileges of the United States Constitution and along with that the right to remain silent and not make statements against his interest while in custody.

These are all factors that weigh into the analysis of what legal implications Mr. Willette's actions have. It is critical to note that Mr. Willette never expressly stated he would not consent to the chemical testing of his blood. Rather, Willette's statements break down to two things. 1. He didn't know what the right answer was, 2. He wanted clarification as to the legal consequences of his actions.

The Legislative intent of requiring the Information under the implied consent statue be read to the accused is to inform them of their rights. Mr. Willette like ***MANY*** of the accused forced into this constitutionally questionable predicament simply wanted to

understand the information being read to him. He never stated he would not consent, he never stated he would. However the Wisconsin Supreme Count under Brar has stated that implied consent comes from the legislature and the act of driving, under that analysis of the law Mr. Willettes consent was valid the moment he started diving in Wisconsin. There is nothing in the record to assert that Willette ever expressly or implicitly revoked that consent. Simply put, none of these actions under any interpretation consists of a revocation of consent for testing.

An individual's consent given by virtue of driving on Wisconsin's roads, often referred to as implied consent, is one incarnation of consent by conduct. Wis. Stat. § 343.305(2) (An individual who "drives or operates a motor vehicle upon the public highways of this state ... is deemed to have given consent to one or more tests of his or her breath, blood or urine."). "By reason of the implied consent law, a driver ... consents to submit to the prescribed chemical tests."[9] State v. Neitzel, 95 Wis.2d 191, 193, 289 N.W.2d 828 (1980); see also State v. Reitter, 227 Wis.2d 213, 225, 595 N.W.2d 646 (1999) ("The implied consent law provides that Wisconsin drivers are deemed to have given implied consent to chemical testing as a condition of receiving the operating privilege."). And, as a plurality of the Supreme Court explained in Missouri v. McNeely, —— U.S. ——, 133 S.Ct. 1552, 1566, 185 L.Ed.2d 696 (2013), "all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense." The "consent" to which this court in Neitzel and the

Supreme Court in McNeely refer is consent sufficient under the Fourth Amendment—not some amorphous, lesser form of consent. See, e.g., People v. Hyde, 393 P.3d 962, 968 (Colo. 2017) ("Hyde's statutory consent also satisfied the consent exception to the Fourth Amendment warrant requirement. This conclusion flows from recent Supreme Court precedent.") State v. Brar, 2017 WI 73, ¶ 21

## CONCLUSION

For the reasons stated above, the Circuit Courts finding of Improper Refusal must be overturned, The refusal must be vacated as the officers conducting the search did not have cause to arrest or relocate him. Further, the officers failed to properly administer the field testing that Willette was subjected to improperly. Finally, Willette did not revoke his consent and did not refuse chemical testing that he had previously implicitly consented to. As such, the matter should be remitted to the Circuit Court with the instruction that the refusal be vacated.

Dated this 27th day of July, 2017

Respectfully Submitted,
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## FORM AND LENGTH CERTIFICATION

I, John M. Carroll, hereby certify that this brief conforms to the rules contained in s. 809.19 (8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 4,272 words.

Dated this 26th day of July 27, 2017

/s/ John Miller Carroll

John Miller Carroll
State Bar #1010478

ELECTRONIC BRIEF CERTIFICATION

I, John M. Carroll, hereby certify in accordance with Sec. 809.19(12)(f), Stats, that I have filed an electronic copy of a brief, which is identical to this paper copy.

Dated this 26th day of July 27, 2017

/s/ John Miller Carroll

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