STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 17AP1518-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

vs.

JESSICA M RANDALL,

Defendant-Respondent.

PLAINTIFF-APPELLANT'S BRIEF

ON APPEAL FROM THE CIRCUIT COURT OF DANE COUNTY,
BRANCH 5, THE HONORABLE NICHOLAS MCNAMARA, PRESIDING

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STATEMENT OF THE ISSUE

Did the circuit court properly grant Randall's motion to suppress the results of a test of her blood under the implied consent law, after she purportedly withdrew her consent to the implied consent procedure after submitting to a blood draw but before the blood was analyzed?

This Court should answer "no," and reverse the circuit court's order granting the suppression motion.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The plaintiff-respondent, State of Wisconsin, does not request oral argument or publication.

STANDARD OF REVIEW

An order granting a motion to suppress evidence is reviewed as question of constitutional fact. *State v. Wantland*, 2014 WI 58, ¶ 18, 355 Wis. 2d 135, 848 N.W.2d 810 (citations omitted). A reviewing court upholds a circuit court's findings of historical fact unless they are clearly erroneous. It independently applies constitutional principles to those facts. *Id.* ¶ 19 (citations omitted).

STATEMENT OF THE CASE AND FACTS

The defendant-respondent, Jessica M. Randall, was arrested in Fitchburg for operating a motor vehicle while under the influence of an intoxicant (OWI), on October 29, 2016. The arresting officer read the Informing the Accused form to Randall, and requested a blood sample. Randall agreed to provide a sample. A sample was drawn at St. Mary's hospital.

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STATEMENT OF THE CASE AND FACTS

The defendant-respondent, Jessica M. Randall, was arrested in Fitchburg for operating a motor vehicle while under the influence of an intoxicant (OWI), on October 29, 2016. The arresting officer read the Informing the Accused form to Randall, and requested a blood sample. Randall agreed to provide a sample. A sample was drawn at St. Mary's hospital.

On October 31, 2016, before the blood sample was analyzed, Randall sent a letter to the Wisconsin State Lab of Hygiene, stating that she "revokes any previous consent that she may have provided to the collection and analysis of her blood," and that she "demands that it be returned to her or destroyed immediately." (18:4.) An advanced chemist at the lab who analyzed the sample responded in a letter referencing the lab's retention policy, and stating that the lab "requires authorization from the specimen submitter prior to releasing a specimen from the laboratory." (18:5.) The advanced chemist analyzed the blood sample on November 7, 2016, and the lab prepared a report on November 10, 2016, indicating that analysis of the blood sample revealed a blood alcohol concentration of .210 grams of ethanol per 100 milliliters of blood. (18:6.)

Randall moved to suppress the blood test result on two grounds; that her consent to the blood draw was not free, intelligent, unequivocal, and specific (17), and that the analysis of the blood

violated the Fourth Amendment because she withdrew her consent to the analysis prior to the blood being analyzed. (18).

The circuit court, the Honorable Nicholas McNamara, presiding, held a hearing on Randall's motions. (32.) The court denied the motion to suppress on the ground that Randall's consent to the blood draw was invalid. (32:39.) But the court granted the motion to suppress the blood test results on the ground that Randall withdrew her consent to analysis of the blood sample she gave before the lab analyzed. (32:61.) The court stated that Randall was "definitely not entitled to have the blood destroyed," but that she withdrew her consent to have the blood analyzed, and that the test results cannot be used at trial. (32:59–60.) The State now appeals the circuit court's order granting the motion to suppress.

ARGUMENT

I. The circuit court erroneously exercised its discretion in granting Randall's motion to suppress the analysis of the blood she gave under the implied consent law.

A. Introduction.

The circuit court concluded that Randall withdrew her consent to analysis of a blood sample that she submitted under the implied consent law, and that evidence of the result of a test of that blood by the Wisconsin State Lab of Hygiene could not be used at Randall's trial for OWI and PAC without violating the Fourth Amendment. (32:61.) The court suggested—but did not decide—that because Randall withdrew her consent, she would be subject to refusal penalties under the implied consent law. As the State will explain, the court erroneously exercised its discretion in granting Randall's motion to suppress. Randall consented to the implied consent procedure, which included the drawing of a sample of her blood, and the testing and analysis of the sample. She could not and did not withdraw her consent under the implied consent law, because the law provides no opportunity or authority to withdraw consent after the implied consent procedure is underway. The law provides no penalties for withdrawal of consent after a sample is given because it is too late to refuse.

The Fourth Amendment does not require suppression because Randall consented to the implied consent procedure, and voluntarily gave up her blood so that it could be analyzed for drugs or alcohol concentration. She had no expectation that her blood would be returned to her and no expectation of privacy in the blood sample that she gave. In contrast, the State has a significant governmental interest in testing and analyzing the blood. Because the government's interest in the blood outweighed Randall's interest once she voluntarily submitted to a blood draw, the lab did not need Randall's consent to test and analyze the

blood. Accordingly, this Court should reverse the circuit court's order granting Randall's motion to suppress the results of the blood test.

B. Under the implied consent law, a person may withdraw his or her implied consent only before submitting a sample of breath, blood, or urine, not after the implied consent procedure is underway.

The issue in this case is whether a person who impliedly consents to the implied consent procedure by operating a motor vehicle on a Wisconsin highway, and then affirms that consent by submitting to an officer's proper request for a blood sample for testing, can short circuit the implied consent procedure once it is underway by withdrawing consent to the final part of the procedure—the analysis of the sample. The State's position is that a person can withdraw his or consent to the implied consent procedure only before the procedure begins, by refusing to provide a sample for testing. But once the person submits to a request for a sample, there is no opportunity or ability to withdraw consent to the procedure.

The implied consent law provides that a person who operates a motor vehicle on a Wisconsin highway "is deemed to have consented to a one or more tests of his or her blood, breath, or urine for the purpose of determining the presence or quantity of in his or her blood or breath," of alcohol or drugs, when an officer requests one or more samples. Wis. Stat. § 343.305(2). When an officer places a person under arrest for an OWI-related offense and requests a sample, the officer is required to read the Informing the Accused form to the person. The officer informs the person that he or she has been arrested for an offense that involves driving or operating a motor vehicle while under the influence of alcohol or drugs, and that:

> 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.

Wis. Stat. § 343.305(4).

The implied consent law, and the Informing the Accused form, speak of the testing of samples. As this Court recognized in *State v VanLaarhoven*, 2001 WI App 275, ¶ 8, 248 Wis. 2d 881, 637 N.W.2d 411, this is a "testing procedure" that includes the giving of a sample and the testing and analysis required for a determination of the concentration of alcohol or drugs in the person's system. As this Court put it, "by operation of law and by submitting to the tests, VanLaarhoven consented to a taking of a sample of his blood and the chemical analysis of that sample." *Id.*

When an officer reads the form to the person, the person has a statutory opportunity to withdraw the consent he or she impliedly gave to provide sample when he or she drove on a Wisconsin highway. The person has no constitutional right to withdraw that consent and refuse to take a requested test. *State v. Reitter*, 227 Wis. 2d 213, 239, 595 N.W.2d 646 (1999). A subject's right to refuse a blood test is simply an opportunity bestowed by the Legislature and not a constitutional right. *South Dakota v. Neville*, 459 U.S. 553, 565 (1983). There is no constitutional right to refuse a breath test. *State v. Mallick*, 210 Wis. 2d 427, 433, 565 N.W.2d 245 (Ct. App. 1997); *State v. Lemberger*, 2017 WI 39, ¶¶ 3, 29, 36, __ N.W.2d __ (Defendant "had no constitutional or statutory right to refuse to take the breathalyzer test….").

By submitting to a blood under the implied consent law a person affirms his or consent to the implied consent procedure, including analysis of the blood. The law authorizes withdrawal of consent before submission to a request for a sample, but not after.

The implied consent law also governs what happens after a person submits or refuses to submit to a request for a sample for

testing. If the person submits, the officer directs the administration of a test. Wis. Stat. § 343.305(5)(a). This obviously does not mean that the officer administers the testing and analysis of a sample. It means that the officer administers the taking of one or more samples of blood, breath, or urine. A person who submits to a request for a sample for testing has a right to an alternative test and additional testing. Wis. Stat. § 343.305(5)(a). Again, this does not mean the person has the right to further analysis of the sample he or she has given. In the case of a breath sample this would be impossible. The statute instead grants a right to give additional samples for testing.

The statute also governs who may draw blood, Wis. Stat. § 343.305(5)(b), who may analyze samples, and how the analysis is conducted. Wis. Stat. § 343.305(6). The statute mandates administrative suspension when analysis of a person's blood, breath, or urine indicates the presence of a restricted controlled substance, or a prohibited alcohol concentration, Wis. Stat. § 343.305(7), and provides for judicial review of such suspensions. Wis. Stat. § 343.305(8). The statue also mandates that if a person who is operating a commercial motor vehicle or is on duty time submits to a test that shows an alcohol concentration above 0.0, the officer must issue an out-of-service order for the 24 hours after the testing. Wis. Stat. § 343.305(7)(b). Logically, this does not mean the 24 hours after the lab analyzes the blood. It means the 24 hours after the person submitted the sample.

Once the person submits to the implied consent procedure, what happens to the sample the person gives is governed by the statute, and is entirely out of the person's hands. The statute does not authorize a person who has submitted to a request for a sample for testing and analysis, and who has chosen not to withdraw his or her consent to the procedure, to do anything after submitting, except take an alternative or additional test and challenge an administrative suspension. Nothing in the statute authorizes a person who has affirmed his or her consent to the implied consent procedure to withdraw that consent after submitting.

The statute also provides for penalties when a person withdraws his or her consent to the implied consent procedure by refusing a request for a sample. When a person "refuses to take a test," the officer is required to "immediately prepare a notice of intent to revoke, by court order under sub. (10), the person's operating privilege." Wis. Stat. § 343.305(9)(a). The officer is required to "issue a copy of the notice of intent to revoke the privilege to the person." *Id.* The officer is then required to submit or mail a copy to the circuit court or municipal court in the county or municipality in which the arrest was made. *Id.*

The refusal subsection of the statute applies when a person "refuses to take test." This cannot mean when a person "refuses to allow the lab to analyze a sample the person has given." A refusal occurs when a person refuses to give a sample.

That a refusal occurs when a person refuses a request for a sample, not when a person alter withdraws consent for analysis of the sample, is evident from the procedures that the implied consent statute sets forth. The notice of intent to revoke that an officer is required to issue upon a refusal must contain information including that prior to the arrest, the officer had probable cause to arrest for an OWI-related offense, the officer complied with sub. (4) by properly reading the Informing the Accused form to the person, and "That the person refused a request under sub. (3)(a)." Wis. Stat. § 343.305(9)(a)1-4.

If the person timely requests a refusal hearing, the issues at the hearing are limited to "Whether the officer had probable cause to believe the person was driving or operating a motor vehicle while under the influence of alcohol [or illegal drugs]," and lawfully arrested the person; "Whether the officer complied with sub. (4)" by properly reading the Informing the accused form to the person; and "Whether the person refused to permit the test." Wis. Stat. § 343.305(9)(a)5.

The final issue, "Whether the person refused to permit the test," plainly corresponds to the information on the notice of intent to revoke, "That the person refused a request under sub. (3)(a)." In other words,

whether a person refused to permit a test is the same as whether the person refused a request for a sample.

The statute provides that a person's withdrawal of consent to the implied consent procedure is not considered a refusal "if it is shown by a preponderance of evidence that the refusal was due to a physical inability to submit to the test due to a physical disability or disease." Wis. Stat. § 343.305(9)(a)5.c. This cannot possibly apply to a person who attempts to withdraw consent to the analysis of a sample that he or she has given. After all, that would mean that such a withdrawal of consent would not be a refusal if the person was physically unable to allow analysis of his or her sample.

The implied consent law also mandates that if a person is operating a commercial motor vehicle or is on duty time "refuses a test," the officer must issue an out-of-service order for the 24 hours after the refusal. Wis. Stat. § 343.305(9)(am). Logically, this does not mean the 24 hours after a person writes to the lab and attempts to stop the analysis of his or her blood sample. It means the 24 hours after the person refused the request for a sample.

The statute provides no mechanism for penalizing a person who attempts to withdraw consent to the analysis of a sample that he or she gave under the implied consent law. There is no need for such a mechanism, because the statute does not authorize a person to withdraw consent to the analysis of a sample that he or she gave under the law after giving a sample. The statute provides a person an opportunity to refuse an officer's request for a sample, and withdraw consent to the implied consent procedure. A person who utilizes that opportunity is subject to penalties including revocation of his or her operating privilege.

The statute does not give a person who submits to a request for a sample, affirming his or her consent to the implied consent procedure, an opportunity to thwart the procedure by refusing to allow analysis of the sample. Accordingly, the statute provides no penalties for

withdrawal of consent to analyze the sample. It is simply too late to withdraw consent to the implied consent procedure.

C. The analysis of a sample given under the implied consent law is not a constitutional search because a person who has submitted a blood sample does not have a reasonable expectation of privacy in the blood.

The Fourth Amendment to the United States Constitution provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourth Amendment prohibits "unreasonable searches." *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2173 (2016). But "a search conducted pursuant to a valid consent is constitutionally permissible." *Wantland*, 355 Wis. 2d 135, ¶ 20 (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 22 (1973)). Under Wisconsin's implied consent law, a person who submits to a request for a sample for testing has consented to the implied consent procedure. *VanLaarhoven*, 248 Wis. 2d 881, ¶ 8.

"[T]he taking of a blood sample or the administration of a breath test is a search." *Birchfield,* 136 S.Ct. at 2173 (citing *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 616–617, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989); *Schmerber v. California*, 384 U.S. 757, 767–768, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966)).

But the analysis of a sample that is lawfully obtained is not a constitutional search. As Justice Scalia has stated "it is not even arguable that the testing of urine that has been lawfully obtained is a Fourth Amendment search." *Ferguson v. City of Charleston*, 532 U.S. 67, 92 (2001) (Scalia, J. dissenting).

As this Court has recognized, "the examination of evidence seized pursuant to the warrant requirement or an exception to the warrant requirement is an essential part of the seizure and does not require a judicially authorized warrant." *VanLaarhoven*, 248 Wis. 2d 881, ¶ 16. This court relied on *State v. Petrone*, 161 Wis. 2d 530, 545, 468 N.W.2d 676 (1991), in which the Supreme Court of Wisconsin rejected the proposition that the State needed a warrant to develop film that it had lawfully seized. The supreme court concluded that "Developing the film did not constitute, as the defendant asserts, a separate, subsequent unauthorized search having an intrusive impact on the defendant's rights wholly independent of the execution of the search warrant." *Id.*

In *VanLaarhoven*, this Court also relied on *United States v. Snyder*, 852 F.2d 471 (9th Cir. 1988). In *Snyder*, the defendant moved to suppress the results of a test of blood taken from him after he was arrested for operating while intoxicated, asserting that "the warrantless analysis of the blood sample was an unreasonable search." *VanLaarhoven*, 248 Wis. 2d 881, ¶ 12 (citing *Snyder*, 852 F.2d at 472). The Ninth Circuit Court of Appeals rejected the defendant's assertion, concluding that:

> The flaw in Snyder's argument is his attempt to divide his arrest, and the subsequent extraction and testing of his blood, into too many separate incidents, each to be given independent significance for fourth amendment purposes. He would have us hold that his person was seized when he was arrested, his blood was seized again upon extraction at the hospital, and finally his blood was searched two days later when the blood test was conducted. It seems clear, however, that *Schmerber* viewed the seizure and separate search of the blood as a single event for fourth amendment purposes. . . .
>
> The only justification for the seizure of defendant's blood was the need to obtain evidence of alcohol content. The Court therefore necessarily viewed the right to seize the blood as encompassing the right to conduct a blood-alcohol test at some later time. Accordingly, we are bound to conclude that under *Schmerber*, so long as blood is extracted incident to a valid arrest based on probable cause to believe that the suspect was driving under the influence of alcohol, the subsequent performance of a blood-alcohol test has no independent significance for

> fourth amendment purposes, regardless of how promptly the test is conducted.

Snyder, 852 F.2d at 473–74 (citing *Schmerber v. California*, 384 U.S. 757, 768 (1966)).

The analysis of Randall's blood in this case was not a separate search requiring either judicial authorization or an exception to the warrant requirement. It was simply part of the search to which Randall consented when she submitted a blood sample for testing under the implied consent law.

The circuit court granted Randall's motion to suppress the results of a test of her blood because it concluded that as a matter of constitutional law," Randall "did withdraw her consent to the search prior to the blood being tested." (32:57.)

The court relied on *Riley v. California*, 134 S.Ct. 2473 (2014), as authority for the necessity of a warrant or an exception to the warrant requirement in order to analyze blood that was lawfully seized from Randall with her consent under the implied consent law. (32:59.) But *Riley* does not apply to the analysis of the blood in this case.

Riley concerned a search of cell phones seized from defendants by police incident to an arrest for traffic violations, and an arrest for an apparent drug sale. *Id.* at 2480–82. The Supreme Court noted that when faced with deciding "whether to exempt a given type of search from the warrant requirement" without "more precise guidance from the founding era," it generally makes the determination "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Id.* at 2484. The Court noted that in *United States v. Robinson*, 414 U.S. 218, 94 S. Ct. 467 (1973), it held that an officer who conducted a patdown search of a person the officer had arrested found a crumpled cigarette pack in the person's pocket, the officers was entitled to search it. *Riley*, 134 S.Ct. at 2483, 2488. But the Court concluded that a search of a cell phone

discovered incident to arrest was different because cell phones "place vast quantities of personal information literally in the hands of individuals." *Id.* at 2485. It added that "A search of the information on a cell phone bears little resemblance to the type of brief physical search considered in *Robinson*." *Id.*

The Supreme Court concluded that the contents of a cell phone carry a significant privacy interest: "With all they contain and all they may reveal, they hold for many Americans 'the privacies of life.'" *Id.* at 2495 (quoted source omitted.) The Court concluded that if police officers want to search a cell phone incident to arrest they must "get a warrant." *Id.*

The circumstances in this implied consent case are entirely different from those in *Riley*. First, this is a consent case, not a search incident to arrest case. Second, unlike the privacy interest in a cell phone, the privacy interest in blood after it has been drawn from a person for testing under the implied consent law, with the person's consent, is insignificant. A person has no reasonable privacy interest in the blood.

In *Birchfield*, the Supreme Court recognized that blood tests involve a more significant intrusion on a person's privacy interests that do breath tests. The Court noted that blood tests "require piercing the skin," and extraction of a part of the subject's body." The Court also noted that

> a blood test, unlike a breath test, places in the hands of law enforcement authorities a sample that can be preserved and from which it is possible to extract information beyond a simple BAC reading. Even if the law enforcement agency is precluded from testing the blood for any purpose other than to measure BAC, the potential remains and may result in anxiety for the person tested.

Birchfield, 136 S. Ct. at 2178.

But the privacy interests that the Court recognized in regard to blood tests apply only to the blood draw, not to analysis of the blood by

a lab. The first privacy interest—the intrusion of a needle into a person's arm—obviously applies only to the blood draw, not to analysis of the sample. The second privacy interest—anxiety about how law enforcement may use the blood after it has been drawn—concerns what will happen to the blood after it is drawn. But the anxiety a person may feel is at issue in determining whether a law enforcement officer needs a warrant to conduct a blood draw. It is not concerned with whether law enforcement needs a warrant to analyze the sample. Analysis of the blood for the purpose for which it was drawn cannot reasonably result in undue anxiety for the person who submitted to the blood draw.

In a case like this one, a defendant who has submitted to a request for a blood draw, and consented to the implied consent procedure, has no privacy interest in the blood he or she has submitted, at least insofar as it is going to be used for the purpose for which it was drawn—determining the alcohol concentration or presence of illegal drugs in the blood. The person has consented to chemical testing by operating a motor vehicle on a Wisconsin highway. The person has submitted to a blood draw. The blood has been taken. The person no longer has a privacy interest in that blood,

In this case, Randall had no subjective privacy interest in the blood she voluntarily gave to officers for testing the concentration of drugs or alcohol in her system. Randall did not move to prevent the lab or law enforcement from using the blood for any purpose other than that for which it was drawn. And as the circuit court correctly concluded, "Ms. Randall definitely is not entitled to have the blood destroyed." (32:60.)

Even if Randall could somehow claim that she had a subjective privacy interest in her blood after she submitted the sample, society would not recognize that interest as reasonable. Law enforcement officers lawfully obtained a sample of Randall's blood under the implied consent law, so that they could determine the concentration of drugs or alcohol in her system. This is the bargain she struck when she drove on

a Wisconsin highway, and then, after she was arrested for OWI, when she chose not to withdraw her consent, but instead to submit to the officer's request for a sample for testing. It would be entirely unreasonable for Randall have a privacy interest sufficient to withdraw her consent, not to the Fourth Amendment event—the extraction of her blood—but to the testing and analysis of the sample days later.

In contrast, there is a legitimate governmental interest in analyzing blood that has been lawfully drawn under the implied consent law. As the Supreme Court recognized in *Birchfield*, "The States and the Federal Government have a "paramount interest ... in preserving the safety of ... public highways." *Birchfield*, 136 S. Ct. at 2178 (quoting *Mackey v. Montrym*, 443 U.S. 1, 17, 99 S.Ct. 2612, 61 L.Ed.2d 321 (1979)). This obviously includes analyzing blood drawn from a person arrested for operating while under the influence of alcohol or drugs in order to gather evidence.

The requirement of a warrant to analyze blood for alcohol or drugs after a person has consented to the blood draw for testing and analysis, would serve no real purpose. After all, as the Court recognized in *Birchfield*, "In order to persuade a magistrate that there is probable cause for a search warrant, the officer would typically recite the same facts that led the officer to find that there was probable cause for arrest, namely, that there is probable cause to believe that a BAC test will reveal that the motorist's blood alcohol level is over the limit." *Id.* at 2181. In a case like this one, a magistrate would have to find only that there is probable cause that blood a person consented to provide after being arrested for an OWI-related offense, based on probable cause, contains evidence of alcohol or illegal drugs. It is difficult to envision a scenario where a magistrate would not issue a warrant to analyze blood that a person gave consensually, under the implied consent law, after a proper request from a law enforcement officer.

In summary, there is a significant governmental interest in testing the blood sample that Randall gave when she consented to the implied consent procedure. And Randall had no reasonable privacy

interest in the blood sample that she gave, when it was to be tested for the purpose for which she gave it—to determine the concentration of alcohol in her blood when she drove on a Wisconsin highway. The Fourth Amendment therefore does not require a warrant or an exception to the warrant requirement to test and analyze the blood. Accordingly, suppression of the results of the blood test is unnecessary and unwarranted.

D. Withdrawal of consent to analyze a sample given under the implied consent law would be contrary to public policy and the purpose of the law.

The Wisconsin Legislature enacted the implied consent statute to combat drunk driving. *State v. Reitter*, 227 Wis. 2d 213, 223-25, 595 N.W.2d 646 (1999), citing *State v. Zielke*, 137 Wis. 2d 39, 46, 403 N.W.2d 427 (1987), in turn citing *State v. Brooks*, 113 Wis. 2d 347, 355-56, 335 N.W.2d 354 (1983). The law was not created to enhance the rights of drunk drivers, but "to facilitate the collection of evidence." *Reitter*, 227 Wis. 2d at 224, citing *Zielke*, 137 Wis. 2d at 46; *State v. Neitzel*, 95 Wis. 2d 191, 203-04, 289 N.W.2d 828 (1980). The purpose of the law "is to obtain the blood alcohol content in order to obtain evidence to prosecute drunk drivers." *State v. Nordness*, 128 Wis. 2d 15, 33, 381 N.W.2d 300 (1986) citing *Brooks*, 113 Wis. 2d at 355 (additional citation omitted). Courts construe the implied consent law liberally in order to effectuate the legislative purpose behind the statute. *Reitter*, 227 Wis. 2d at 224-25, citing *Zielke*, 137 Wis. 2d at 47.

The "clear policy of the statute is to facilitate the identification of drunken drivers and their removal from the highways." *Village of Elm Grove v. Brefka*, 2013 WI 54, ¶ 31, 348 Wis. 2d 282, 832 N.W.2d 121 (citing *Neitzel*, 95 Wis. 2d at 193. "More pointedly, its purpose is 'to get drunk drivers off the road as expeditiously as possible and with as little possible disruption of the court's calendar.'" *Id.* (quoting *Brooks*, 113 Wis. 2d at 359, 335 N.W.2d 354.) (additional citation omitted).

A requirement of a warrant for analysis of blood samples submitted under the implied consent law would be contrary to the policy behind implied consent laws. In *Birchfield*, the Court noted the large number of arrests for driving while under the influence of drugs or alcohol, and concluded that requiring a warrant "in every case would impose a substantial burden but no commensurate benefit." *Birchfield*, 136 S. Ct. at 2181–82. If law enforcement were required to obtain a warrant whenever a person withdrew consent after the blood draw, but before analysis of the sample, law enforcement and judicial officials would be unnecessarily bogged down in order to protect a privacy interest that is non-existent—or at most minimal—against a legitimate and important governmental interest.

As the circuit court recognized when it began its analysis in this case, "it would be one giant loophole if it was legal for defendant to avoid [the] consequences of implied consent law." (32:9.). As the court later observed, "It truly is an inequitable, unfair, and contrary to public policy - - I'm sure, regarding the vigorous enforcement of drunk driving cases – to allow a person in Ms. Randall's position to avoid the administrative consequences of a refusal by giving her consent but, then, also avoiding the criminal prosecution of -- - with blood evidence by later withdrawing her consent and avoiding any consequences of the administrative penalties." (32:56.)

The court was correct. Allowing a person who submits to the implied consent procedure to withdraw that consent after giving a sample, and after her withdrawal of consent can be treated as a refusal, would be contrary to public policy. And, as explained above, withdrawal of consent would serve no purpose, because the analysis of a sample procured under the implied consent law is not a constitutional search requiring a warrant or an exception to the warrant requirement, such as consent.

CONCLUSION

For the reasons explained above, the State respectfully requests that this Court reverse the circuit court's order granting Randall's motion to suppress evidence of the results of a test of her blood.

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CERTIFICATION

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

> 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, maximum of 60 characters per full line of body text. Italics may not be used for normal body text but may be used for citations, headings, emphasis and foreign words. The length of this brief is 7581 words.

Dated: December 18, 2017.

Signed,

_____

Assistant District Attorney
Dane County, Wisconsin
Attorney for Plaintiff- Appellant-Respondent
State Bar No. 1098784

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 18th day of December, 2017.

_____

Assistant District Attorney
Dane County, Wisconsin
Attorney for Plaintiff- Appellant-Respondent
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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix that complies with the content requirements of Wis. Stat. § (Rule) 809.19(2)(2); that is, the record documents contained in the respondent's supplemental appendix fall into one of the categories specified in sub. (2)(a).

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 18th day of December, 2017.

_____

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Dane County, Wisconsin
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APPENDIX

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