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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2017AP1518-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

vs.

JESSICA M RANDALL,

Defendant-Respondent.

REPLY BRIEF AND APPENDIX

ON APPEAL FROM AN ORDER GRANTING A MOTION TO SUPPRESS EVIDENCE, ENTERED IN THE CIRCUIT COURT FOR DANE COUNTY, THE HONORABLE NICHOLAS MCNAMARA, PRESIDING

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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 issue in this case is whether the circuit court properly granted Randall's motion to suppress the results of a test of her blood withdrawn after she submitted to an officer's request for a blood draw under the implied consent law. Randall wrote to the lab that was going to analyze the blood, and purportedly withdrew her consent to the analysis of the blood, and demanded that that blood be destroyed or returned to her. (18:4.) The lab analyzed the blood, which revealed a blood alcohol concentration of .210. (18:6.) Randall moved to suppress the test result, asserting that the analysis of the blood violated the Fourth Amendment because she withdrew her consent before the analysis was completed. (18.)

The circuit court recognized that Randall's claim would constitute a "giant loophole," intended "to avoid [the] consequences of implied consent law." (32:9.). The court noted that it would be "inequitable, unfair, and contrary to public policy" for Randall "to avoid the administrative consequences of a refusal by giving her consent," but then also avoiding criminal prosecution "by later withdrawing her consent." (32:56.) Nonetheless, the court granted Randall's motion to suppress, concluding that because she

revoked her consent to search before the lab analyzed the blood, the test result was inadmissible. (32:61.)

In its opening brief, the State explained that Randall could have withdrawn her consent before she submitted to the request for a blood sample, but not before. It also explained that Randall had no reasonable expectation in her blood after she voluntarily surrendered it. Finally, the State asserted that withdrawing consent after a person submits to a request for a blood draw, in order to prevent analysis of the blood sample, would be contrary to public policy and the purpose of the implied consent law.

Two days after the State filed its brief, this Court rejected the same claim Randall made in this case, under virtually identical circumstances, in *State v. Sumnicht*, 2017AP280-CR, 2017 WL 6520961 (Wis. Ct. App. Dec. 20, 2017).

In *Sumnicht*, the defendant was arrested for OWI and she submitted to request for a blood sample under the implied consent law. *Id.* ¶ 2. Three days later, her attorney wrote to the Wisconsin State Lab of Hygiene, purporting to revoke her consent, and requesting that the blood sample not be analyzed. *Id.* ¶4. The lab analyzed the blood sample. *Id.* Sumnicht moved to suppress the test result, arguing that she had revoked her consent to the analysis. *Id.* ¶5. The circuit court denied Sumnicht's motion, concluding that she could not withdraw her consent after she submitted to the request for a sample. *Id.* ¶ 7.

This Court affirmed. It rejected Sumnicht's arguments that she could revoke her consent any time prior to the analysis being completed, and that she "'was entitled to rely on the privacy of the information' in her sample." *Id.* ¶ 19. This Court recognized that a

person may limit or revoke consent to a search, but it concluded that Sumnicht's "attempt to revoke was simply too late." *Id.* ¶¶ 20–21. This Court determined that "The search ended upon the blood being drawn," and that "by the time the attorney's letter was sent, the search was already over and the search-and seizure-related constitutional protections had been satisfied." *Id.* ¶ 21. This Court concluded that Sumnicht impliedly consented to a blood draw by driving on a Wisconsin highway, and that by voluntarily consenting to a blood draw, she "passed on the opportunity to revoke her implied consent." *Id.* ¶ 23.

In her brief, Randall does not mention *Sumnicht*.[1] The State acknowledges that *Sumnicht* is not binding. But this Court analyzed a factual background that is materially identical to the one in this case, and the same defense arguments, and concluded that the defense arguments are wrong. This Court should reach the same conclusion in this case.

Randall had no reasonable privacy interest in her blood after she voluntary surrendered her blood for the purpose of analysis for alcohol or drugs.

In its opening brief, the State explained that when Randall submitted to the officer's request for a blood sample under the implied consent law, she voluntarily surrendered her privacy interest in the blood so long as it is used for a specific purpose—testing for alcohol or drugs. The State did not dispute that Randall had a privacy interest in the blood sample as related to anything other than analysis for alcohol or drugs. But if she wanted to exercise a privacy interest in her blood so that it may not be tested for alcohol or drugs, she could have chosen to withdraw her implied consent, and not submit

[1] Because *Sumnicht* is unpublished, Randall had no duty to cite or distinguish it. Wis. Stat. § 809.23(3)(b).

to the request for the sample. She chose not to do so. *See Sumnicht*, 2017 WL 6520961, ¶ 23.

Randall cites *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016) for the proposition that a person has a privacy interest in his or her blood that extends beyond the analysis of the blood for alcohol or drugs. (Randall's Br. 11–12.)

The Supreme Court recognized in *Birchfield* that a person may have anxiety about what law enforcement might do with a blood sample—that is in part why it concluded that a State may criminalize refusal to submit to a breath test, but not refusal to submit to a blood draw. Birchfield, 136 S. Ct. 2178. But nothing in *Birchfield* suggests that a person can voluntarily give a blood sample for analysis—thereby surrendering her privacy interest in the blood as it relates to that analysis—and then reclaim that privacy interest so long as she withdraws consent before the analysis is completed.

Society would not recognize as reasonable a privacy interest in blood that a person has voluntarily surrendered so that it cannot be tested for the presence of drugs or alcohol—the purpose of the blood draw. In contrast, 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.

Randall argues that police could have obtained a warrant "prior to a blood draw." (Randall's Br. at 12.)

But the State did not need a warrant. "The Fourth Amendment ordinarily requires a search warrant for a blood draw unless one of the exceptions to the warrant requirement exists." *State v. Blackman*, 2017 WI 77, ¶ 4, 377 Wis. 2d 339, 898 N.W.2d 774 (citing *Birchfield*, 136 S.Ct. at 2173.) Here, Randall affirmed the consent to a blood draw that she impliedly gave by driving on a Wisconsin highway. She does not dispute that the blood draw—the Fourth Amendment event—was constitutional.

Randall argues that *Birchfield* provides that a person has a reasonable expectation of privacy in blood that he or she gives voluntarily under the implied consent law, and that this privacy interest is indefinite because "as long as the sample is in police possession, the potential for the extraction of personal information from the sample remains." (Randall's Br. at 12.)

But again, Randall surrendered her blood voluntarily so that it could be analyzed for a specific purpose—a determination of the level of alcohol or drugs in her system. Any other use would violate the implied consent law. But society would not recognize as reasonable any expectation of privacy in the blood sample that she voluntarily gave so long as the sample is being used only for the purpose for which she gave it—analysis for drugs or alcohol.

A person cannot withdraw consent under the implied consent law after the Fourth Amendment event—the seizure of the blood.

Randall argues that the analysis of her blood is a search, and that she has a right to limit the scope of that search by stopping the lab from analyzing the blood. (Randall's Br. at 14).

This Court rejected the same argument in *Sumnicht*. This Court recognized that while a person may limit or revoke consent, an attempt to revoke consent to a blood draw after the blood is drawn is "simply too late." *Sumnicht*, 2017 WL 6520961, ¶ 21.

Randall compares the analysis of the blood that she voluntarily gave to the search of a house. (Randall's Br. 14.)

But while a person who consents to a search of her home can limit the scope of that search, she cannot withdraw her consent after law enforcement has discovered evidence. The situation here is akin to a person attempting to withdraw her consent to a search of her home after officers have conducted a search and found a bag containing a leafy green substance that the officer has probable cause to believe is marijuana. Randall points to no authority holding that a person in that situation can withdraw her consent to search, and therefore prevent law enforcement from analyzing the substance in the bag to determine if it is marijuana. And this Court rejected that argument in *Sumnicht*, noting that "Wisconsin courts have squarely rejected arguments challenging the examination of lawfully seized evidence, including subsequent testing of blood drawn pursuant to a warrant, consent, or exigent circumstances." *Sumnicht*, 2017 WL 6520961, ¶ 21.

Randall submitted to a blood draw, affirming the consent to a blood draw that she impliedly gave by operating a motor vehicle on a Wisconsin highway. Now, after officers have obtained evidence—the blood sample—that they have probable cause to believe contains a prohibited level of alcohol or drugs, she cannot withdraw her consent to a search and therefore prevent the State from analyzing the blood to determine if it contains alcohol or drugs.

Randall also compares the analysis of her blood to a search of a cell phone seized incident to arrest. (Randall's Br. at 22-23.) She argues that "Even though a piece of evidence is already in police custody, when there is no legal basis for a search, the search is unlawful." (Randall's Br. at 23.) But here, as this Court recognized in *Sumnicht*, "the search ended upon the blood being drawn." *Sumnicht,* 2017 WL 6520961, ¶ 21.

Randall argues that the State is incorrect in asserting that a person has no right to refuse a request to give a sample for chemical testing under the implied consent law. (Randall's Br. at 15.) But both the United States Supreme Court and the Supreme Court of Wisconsin have explicitly stated that there is no right to refuse a request for a sample under the implied consent law as addressing constitutional rights other than the Fourth Amendment.

In *South Dakota v. Neville*, 459 U.S. 553 (1983), the United States Supreme Court concluded that a state could use a refusal to show a defendant's consciousness of guilt because the right to refuse a blood alcohol test was "not of constitutional dimension," but was instead "simply a matter of grace bestowed by the South Dakota legislature." *Neville*, 459 U.S. at 565.

Similarly, in numerous Wisconsin cases, including *State v. Lemberger*, 2017 WI 39, 374 Wis. 2d 617, 893 N.W.2d 232, and *State v. Reitter*, 227 Wis. 2d 213, 595 N.W.2d 646 (1999), the Supreme Court of Wisconsin has recognized that there is no right to refuse a test under the implied consent law.

Randall attempts to distinguish these cases, arguing that *Reitter* concerned "issues of statutory construction, due process, and the right to counsel," and *Lemberger* and

Neville concerned "a claim that commentary on the defendant's refusal was barred by the Fifth Amendent." (Randall's Br. at 17.)

But in *Neville*, the Court's conclusion that the State could comment on the defendant's refusal was premised on the court's recognition that there is no right to refuse chemical testing under the implied consent law. *Neville*, 459 U.S. at 565. In *Reitter*, the court concluded that it is "The absence of a constitutional right to refuse a test" that means that an officer need not read the *Miranda* warnings before administering a test under the implied consent law. recognized that a person has "has no choice in respect to granting his consent." *Reitter*, 227 Wis. at 239

And in *Lemberger*, which involved a breath test, the supreme court concluded that the State could properly comment at trial on the defendant's refusal to submit to chemical testing because there is no constitutional or statutory right to refuse the test. *Lemberger*, 374 Wis. 2d 617, ¶¶ 3, 19, 29, 34, 36.

Randall points to no case, in Wisconsin or any other jurisdiction, which has recognized a constitutional right to refuse q request for a sample for chemical testing under an implied consent law.

Randall points out that Wisconsin's implied consent law provides a statutory opportunity to withdraw the consent a person impliedly gives to chemical testing when he or she drives in Wisconsin. (Randall's Br. at 19.)

But the implied consent law, which requires an officer to prepare and issue a notice of intent to revoke a person's operating privilege immediately upon refusal, Wis. Stat. § 343.305(9)(a), obviously does not contemplate or authorize refusal after a person

has submitted to a request for a sample. After all, the notice of intent to revoke informs the person that one issue at a refusal hearing is "whether the person refused a request under sub. (3)(a)," the subsection under which an officer requests a sample. Wis. Stat. § 343.305(9)(a)3.

Randall also argues that the State forfeited its right to advance an argument that if she validly revoked her consent revoked her consent in her letter to the lab, she would not be subject to penalties for refusal. (Randall's Br. 21–22.) Randall relies on *In re Guardianship of Willa L.*, 2011 WI App 160, 338 Wis. 2d 114, 808 N.W.2d 155, which noted that the "'fundamental' forfeiture inquiry is whether a legal argument or theory was raised before the circuit court, as opposed to being raised for the first time on appeal in a way that would 'blindside' the circuit court." *Id.* ¶ 25.

The State has not raised a new issue or argument and is in no way blindsiding the circuit court. The circuit court considered the implications of its decision, specifically as they relate to refusal sanctions. (32:55–57). The court noted that the consequences for refusal are set by statute, and observed that "it's hard to know" if "this should count as a refusal." (32:56). The court noted stated that it would be "unequitable, unfair, and contrary to public policy" if a person in Randall's position could "avoid the administrative consequences of a refusal by giving her consent but, then, also avoiding the criminal prosecution" by later withdrawing her consent. (32:56.) The court did not decide whether Randall would be subject to refusal penalties if it granted her motion to suppress the blood test results. (32:61.) But the court raised and addressed the issue.

In addition, in the circuit court Randall asserted that it was unclear whether she would be subject to refusal penalties if her motion were granted (32:8–9), and acknowledged that "it would be unfair if this was some sort of gigantic loophole in the implied consent law where you can have your cake and eat it too." (32:7.) The circuit court was not blindsided by the State's argument on appeal.

Randall asserts that under *State v. Moline*, 170 Wis. 2d 531, 489 N.W.2d 667 (Ct. App. 1992), she perhaps would be subject to penalties for refusal. (Randall's Br. at 22). But *Moline* concerns whether a person who refused a request for a sample would be subject to refusal penalties if the officer failed to immediately give the person a notice of intent to revoke his or her operating privilege.

Here, in contrast, Randall did not refuse. She affirmed her implied consent. If she is were allowed to withdraw her consent days later, and the State attempted to impose sanctions for refusal, she presumably would prevail at a refusal hearing. After all, the notice of intent to revoke informs the person that one issue at the refusal hearing is "Whether the person refused a request under sub. (3)(a)." Wis. Stat. § 343.305(9)(a)2. A person like Randall, who submitted to a request for a sample, did not refuse the request.

Of course, this Court need not reach the issue what consequences might result if Randall were found to have withdrawn her consent, because as it concluded in *Sumnicht*, by submitting to the officer's request for a blood sample, Randall "passed on the opportunity to revoke her implied consent." *Sumnicht*, 2017 WL 6520961, ¶ 23.

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:

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Dated: _____.

Signed,

_____
Attorney Awais M. Khaleel

CERTIFICATE OF COMPLIANCE
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I hereby certify that:

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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 28 day of March, 2018.

_____

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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 28 day of March, 2018.

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