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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 18 AP 1154 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

KATHRYN M. COOPER,

Defendant-Appellant

# BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ON APPEAL FROM A FINAL ORDER ENTERED ON
JUNE 13, 2018, IN THE CIRCUIT COURT
FOR PORTAGE COUNTY,
THE HONORABLE TODD WOLF PRESIDING.

Respectfully submitted,

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Defendant-Appellant

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## STATEMENT OF THE ISSUES

I. DID THE CIRCUIT COURT ERR WHEN IT HELD THE OFFICER'S WARRANTLESS ENTRY INTO MS. COOPER'S HOME WAS LAWFUL?

II. DID THE CIRCUIT COURT ERR WHEN IT HELD THAT THE STATE SATISFIED ITS BURDEN OF DEMONSTRATING MS. COOPER VOLUNTARILY CONSENTED TO THE BLOOD DRAW?

## STATEMENT ON PUBLICATION

Defendant-appellant recognizes that this appeal, as a one-judge appeal, does not qualify under this Court's operating procedures for publication. Hence, publication is not sought.

## STATEMENT ON ORAL ARGUMENT

Oral argument would be appropriate in this case only if the Court concludes that the briefs have not fully presented the issues being raised on appeal.

## STATEMENT OF THE CASE AND FACTS

On January 5, 2017, Sergeant Michael Retzki (Sgt. Retzki) of the Stevens Point Police Department responded to a call of a single vehicle which struck a light pole.[1] Dispatch stated a license plate had been left at the scene.[2] The license plate came back to Kathryn Cooper.[3] Sgt. Retzki went to Fourth Avenue, the street on which Ms. Cooper lived.[4] Once in her neighborhood, Sgt. Retzki made contact with the 9-1-1 caller, who stated he had witnessed the accident, and pointed Sgt. Retzki in the direction of Ms. Cooper's residence.[5] Sgt. Retzki observed that the vehicle parked in Ms. Cooper's driveway had visible damage and was leaking fluid, consistent with being involved in a recent accident.[6]

At this point, Sgt. Retzki walked onto the back porch towards the back door.[7] He saw Ms. Cooper walking around in her kitchen.[8] Sgt. Retzki testified he knocked on the door and Ms. Cooper waved at him to come in.[9] He entered her home, walking two to three feet

[1] R.62 at 4–5.
[2] R.62 at 5.
[3] R.62 at 5–6.
[4] R.62 at 6.
[5] R.62 at 6.
[6] R.62 at 7.
[7] R.62 at 7.
[8] R.62 at 7.
[9] R.62 at 8; R.62 at 13.

into the kitchen.[10] Ms. Cooper did not say anything to him.[11] He did not identify himself as a police officer.[12] Sgt. Retzki told Ms. Cooper he was investigating an accident, informed her that her vehicle was damaged, and asked her if she recalled being in an accident.[13]

Shortly thereafter, Officer Dana Krzykowski arrived at the residence and stood on Ms. Cooper's back porch.[14] Sgt. Retzki made eye contact with the officer, and Sgt. Retzki waved him in, opening the door to Ms. Cooper's home.[15] Officer Krzykowski then began questioning Ms. Cooper about the accident.[16] Officer Krzykowski took Ms. Cooper outside to perform field sobriety testing.[17] Ms. Cooper was reluctant to participate in the police's investigation, and repeatedly stated that she wanted to walk away and go back into her house.[18] Eventually, Ms. Cooper's husband was able to convince her to submit to field sobriety testing.[19] Ms. Cooper also would behave bizarrely, at one point bursting into laughter.[20] After Officer Kryzkowski administered field sobriety testing, he arrested Ms.

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[10] R.62 at 8.
[11] R.62 at 8.
[12] R.62 at 13.
[13] R.62 at 14.
[14] R.62 at 8.
[15] R.62 at 8–9; R.62 at 18.
[16] R.62 at 19.
[17] R.62 at 23–24.
[18] R.62 at 23–24.
[19] R.62 at 23.
[20] R.62 at 24.

Cooper for operating while under the influence of an intoxicant.[21] Ms. Cooper was handcuffed and placed in the back seat of the squad car.[22]

Officer Kryzkowski then read her the Informing the Accused form.[23] Ms. Cooper gave an affirmative response and agreed to submit to the blood draw.[24] Ms. Cooper's blood alcohol concentration that evening was .330 g/mL.[25]

On February 10, 2017, the Portage County District Attorney's Office charged Ms. Cooper with operating while under the influence of an intoxicant and operating with a prohibited alcohol concentration, both as third offenses.[26] On May 5, 2017, Ms. Cooper moved to suppress the test result based on a lack of constitutional consent.[27] She also moved to suppress all evidence derived from the police's unlawful entry into her home.[28]

On December 15, 2017, the circuit court, the Honorable Todd Wolf presiding, heard testimony and argument on Ms. Cooper's motions. Afterwards, the court ruled. It denied both Ms. Cooper's

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[21] R.62 at 19.
[22] R.62 at 21.
[23] R.62 at 20–21.
[24] R.62 at 21.
[25] R.62 at 25.
[26] R.2.
[27] R.19.
[28] R.20.

motions.[29] When addressing Ms. Cooper's unlawful entry motion, the court stated:

> [Sgt. Retzki] indicated he was on duty, he was responding to this as a law enforcement officer[.] . . . I don't even know if there has to be a necessity that she has to know it's an officer . . . [Sgt. Retzki] is in an area that he was invited into. Another officer arriving then and coming to that same location, it wasn't that Officer [Kryzkowski] then went to some other location and [Sgt.] Retzki wasn't already there, so I don't find any evidence here to indicate that this was an unlawful entry by the officers then, and the motion regarding the entry is denied.[30]

When the circuit court moved onto the issue of whether constitutional consent to the blood draw existed, it first addressed ***State v. Brar***, and declared that the lead opinion in the ***Brar*** case stated:

> [T]hat there's obviously the presumption that when someone got their license, that they were consenting to a draw, which is why under the implied consent law, and I haven't seen anything that has changed that, if someone is unconscious and that, it normally can be drawn because of that presumption under the implied consent law. . . [U]pon the officer reading the Informing the Accused form, that . . . by reading that form, gives someone the opportunity then to withdraw their previously given consent.[31]

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[29] R.62 at 35; 42.
[30] R.62 at 33–34; 35.
[31] R.62 at 36–37, referencing ***State v. Brar***, 2017 WI 73, 376 Wis. 2d 685, 898 N.W.2d 499.

The circuit court also referenced the concurring opinion in ***Brar*** as it addressed voluntary consent, which required the circuit court to:

> [L]ook at the totality of the circumstances . . . [W]hether there was deception, trickery, misrepresentation . . . sleep deprivation, food deprivation, age of the person, the intelligence, any physical or emotional conditions that go on[.][32]

When addressing the voluntariness analysis in Ms. Cooper's case, the circuit court stated:

> I didn't find any reason here that there has been any evidence that she was – had any sort of trickery or deception or misrepresentation. The officer indicated he went through the Informing the Accused verbatim, and that there was no indication and no contrary evidence to say that she didn't at that point in time agree[.] [This] is a continuation of her previous implied consent here, and that there was no indication she was deprived of any sleep or food or anything such as that. There is [sic] issues regarding her intoxication[.] . . . [I]f the Court would start applying that as a substantial factor in the voluntariness, it's going to be a situation where it is an after-the-fact situation and puts an officer in an untenable situation each and every time they are doing that to try to figure out themselves of what kind of situation a person is [in]. . . [S]o I don't find that under the totality of the circumstances The Court can rely heavily on an after-the-fact test score that comes in. There was no indication [to] the officers on that night that she wasn't able to understand what she was being read. She answered the question. There was no hesitation. She wished to talk to her husband, was brought out by the officer, a very rational thing someone might ask to do, which . . . was part of the reason she was willing to perform testing. They went through the testing procedure. The officers appeared to do nothing to deceive or trick

[32] R.62 at 38–39.

> her, and for all of those reasons and [***Brar***] majority opinion here, I do find that the consent was voluntary[.][33]

On June 13, 2018, Ms. Cooper pled guilty to operating while under the influence of an intoxicant, third offense.[34] That same day, the court pronounced sentence.[35]

On June 18, 2018, Ms. Cooper appealed her conviction to this Court.[36]

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[33] R.62 at 40–41.
[34] R.40; R.41.
[35] R.41.
[36] R.52.

## ARGUMENT

### I. THE CIRCUIT COURT ERRED IN HOLDING THE ENTRY INTO MS. COOPER'S HOME WAS LAWFUL.

#### A. Standard of Review

Whether a search is valid under the Fourth Amendment is a question of constitutional law reviewed *de novo*.[37] Appellate courts uphold findings of historical fact unless they are clearly erroneous.[38]

#### B. Ms. Cooper did not consent to Sgt. Retzki entering her home.

The Fourth Amendment provides for "[t]he right of people to be secure in their . . . houses . . . against *unreasonable* searches and seizures." When a police officer enters a person's home to search, he or she needs a warrant based upon probable cause or an exception to the warrant requirement. One possible exception is consent to a search.[39] Another exception to the warrant requirement is probable cause and exigent circumstances.[40] Exigent circumstances may be hot pursuit, a threat to the safety of a person, a risk of evidence being destroyed, or the likelihood that the suspect will flee.[41]

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[37] ***State v. Guzman***, 166 Wis. 2d 577, 586, 48 N.W.2d 446 (1992).
[38] ***State v. Robinson***, 2010 WI 80, ¶ 22, 327 Wis.2d 302, 786 N.W.2d 463.
[39] ***Schneckloth v. Bustamonte***, 412 U.S. 218, 219 (1973).
[40] ***State v. Ferguson***, 2009 WI 50, ¶ 19, 317 Wis. 2d 586, 767 N.W. 2d 187.
[41] ***State v. Richter***, 2000 WI 58, ¶ 29, 235 Wis. 2d 524, 612 N.W.2d 29.

The intrusion into Ms. Cooper's home was neither justified by a search warrant nor by an exception to the warrant requirement. Instead, the State argued Sgt. Retzki entered Ms. Cooper's home based on her invitation.[42] In other words, that consent provided the legal mechanism for entering the home.[43]

As a preliminary matter, Ms. Cooper could not have consented to Sgt. Retzki entering her home. By all indications, she did not know Sgt. Retzki was a law enforcement officer when she "consented" to his entering her home. This was not bona fide consent. Sgt. Retzki did not identify himself as an officer before he sought to enter Ms. Cooper's kitchen.[44] Nor did the State elicit testimony at the motion hearing that demonstrated Ms. Cooper knew she had waved an officer into her home.[45] For example, it was unclear from Sgt. Retzki's testimony whether Ms. Cooper would have been able to see his parked squad vehicle.[46] She certainly did not mention having seen the squad vehicle to him when he first entered the home.[47] Nor did he inform her that he was an officer after he entered the home.[48] He simply walked in, informed her he was investigating the accident, and began

[42] R.62 at 26.
[43] R.62 at 26.
[44] R.62 at 13.
[45] R.62.
[46] R.62.
[47] R.62 at 8.
[48] R.62 at 13–14.

to question her.[49] When Officer Krzykowski entered the home at Sgt. Retzki's invitation, this was not consent to entering, either. At that point, Ms. Cooper acquiesced to a display of authority by Sgt. Retzki. Therefore, because it was not bona fide consent in either case, Ms. Cooper did not consent to either officer entering her home. The State may not rely upon consent to justify either officer entering Ms. Cooper's home. Because the police did not obtain a warrant to enter the residence, any evidence seized after this entry must be suppressed.

### C. Should this Court find Ms. Cooper consented to the entry into her home, she could not have voluntarily consented.

Under ***Bumper v. North Carolina***, where the government relies upon consent to justify a Fourth Amendment search, it must also show "that the consent was, in fact, freely and voluntarily given."[50] Where consent is obtained through a person "acquiesce[ing] to a claim of lawful authority" the person could not have freely and voluntarily consented to the search.[51] These principles must necessarily apply to when a person consents to the police entering a residence, as the police

[49] R.62 at 14.
[50] ***Bumper v. North Carolina***, 391 U.S. 543, 548 (1968).
[51] ***Id.*** at 548–59.

entering a home is an intrusion into a person's privacy interests under the Fourth Amendment.

In examining the voluntariness of a person's consent to a search, the United States Supreme Court in ***Schneckloth v. Bustamonte*** has held that knowing consent to a search is a factor in considering whether a person voluntarily consented.[52] Though the Supreme Court specifically referred to whether a defendant knew he or she could refuse consent, the principle is the same: whether a person must knowingly decide whether to give consent to a search.

The Supreme Court in ***Schneckloth*** stated that when the decision to give or not give consent is not knowing, it may also be coerced, "by explicit or implicit means, by implied threat or covert force."[53] Accordingly, a reviewing court must examine "all the surrounding circumstances" of the consent with "the most careful scrutiny" to ensure that the search was not "a pretext for the unjustified police intrusion against which the Fourth Amendment is directed."[54]

There are several issues with the State's position that Ms. Cooper voluntarily consented to the police's entry into her home.

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[52] ***Bustamonte***, 412 U.S. at 248–49.
[53] ***Id.*** at 228.
[54] ***Id.*** at 228–29.

First, Sgt. Retzki did not identify himself as an officer before he sought to enter Ms. Cooper's home.[55] Nor did he inform her that he was an officer after he entered the home.[56] The State argued that because Ms. Cooper did not object to either of the officers entering her home, she freely consented to the two police officers entering.[57]

Though knowingly giving consent is just one factor to consider in analyzing voluntary consent, examining the facts here, Ms. Cooper's consent to the officer's entry into her home was not knowing and was and therefore coerced. If Ms. Cooper wished Sgt. Retzki to enter her residence in his capacity as a police officer, presumably to perform his investigatory duties, why would she later in their contact have repeatedly stated she did not want to participate in the investigation and wanted to walk away?[58] The answer is that Ms. Cooper would not have consented to a police officer entering her home that night had she known he was an officer.

The circuit court stated Sgt. Retzki "indicated he was on duty" and "he was responding to this as a law enforcement officer."[59] Yet Sgt. Retzki's testimony was that he *did not* identify himself as a police

[55] R.62 at 13.
[56] R.62 at 13–14.
[57] R.62 at 26.
[58] R.62 at 23–24.
[59] R.62 at 33.

officer.[60] Sgt. Retzki told Ms. Cooper he was investigating an accident, informed her that her vehicle was damaged, and asked her if she recalled being in an accident.[61] Though the circuit court seems to conclude it was obvious Sgt. Retzki was investigating as a law enforcement officer, it was not in fact clear in what capacity he entered her home. Moreover, other factors demonstrate Ms. Cooper did not voluntarily consent to Sgt. Retzki's entering her home. Given her extraordinarily high blood alcohol concentration, Ms. Cooper likely was not, as something of an understatement, functioning optimally.[62]

Even if she had not been affected by the vast amount of alcohol she had consumed, the record indicates that Ms. Cooper was in her kitchen alone, and she apparently waved in an unknown man into her home after he knocked on her back door.[63] It was not clear from the record that Ms. Cooper knew she was inviting an officer into her home—and as illustrated above, she likely would not have done so.[64] The unusual behavior of inviting an unknown man into her home, as well as the disregard for potential danger this demonstrates, given that she appeared to be alone at home, indicates Ms. Cooper was likely not

[60] R.62 at 13.
[61] R.62 at 14.
[62] R.62 at 25.
[63] R.62 at 8; R.62 at 13.
[64] R.62 at 13–14.

thinking clearly that evening.[65] In all, these factors indicate Ms. Cooper could not have voluntarily consented to the officer's entry into her home. Because her consent to Sgt. Retzki's entering her home was coerced, her consent was involuntary. The State cannot rely upon consent to justify the police's entry.

When Sgt. Retzki allowed Officer Krzykowski into Ms. Cooper's home, that was a further encroachment upon Ms. Cooper's Fourth Amendment rights. There is no indication in the record that Ms. Cooper consented to the second officer entering her home.[66] There was no testimony given during the motion hearing that she waved the second officer in or otherwise assented to his entering her home.[67] Accordingly, the State may not rely upon consent for the second officer to bolster its argument that Ms. Cooper voluntarily consented to the police entering her home.

### D. At the time Sgt. Retzki entered Ms. Cooper's home, no other exception to the warrant requirement existed to justify the warrantless entry.

Just as the State may rely upon consent as an exception to the warrant requirement to justify entering a person's home, the State may

[65] R.62 at 8; R.62 at 13–14.
[66] R.62 at 26.
[67] R.62 at 26.

also rely upon exigent circumstances. When a police officer enters a person's home to search, he or she needs a warrant based upon probable cause or an exception to the warrant requirement. One possible exception is probable cause and exigent circumstances.[68] Exigent circumstances may be hot pursuit, a threat to the safety of a person, risk of evidence being destroyed, or the likelihood that the suspect will flee.[69] In circuit court, the State did not rely upon any exigent circumstances or elicit testimony on any exigency during the motion hearing in Ms. Cooper's case.[70]

At the time Sgt. Retzki entered Ms. Cooper's home, there may have been probable cause to suspect Ms. Cooper of committing a crime, but no exception to the warrant requirement applied to justify the warrantless entry. The information known to Sgt. Retzki was the following: a single vehicle accident had occurred, Ms. Cooper's license plate had been left at the scene, and a person identified Ms. Cooper's residence as the residence of the person involved in the accident.[71] The person also claimed to have witnessed the accident and followed Ms. Cooper to her residence.[72]

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[68] ***State v. Ferguson***, 2009 WI 50, ¶ 19, 317 Wis. 2d 586, 767 N.W. 2d 187.
[69] ***State v. Richter***, 2000 WI 58, ¶ 29, 235 Wis. 2d 524, 612 N.W.2d 29.
[70] R.62.
[71] R.62 at 10.
[72] R.62 at 10.

However, some factors here are unfavorable to the probable cause analysis. To begin with, Sgt. Retzki did not speak with the witness beyond getting the address.[73] In addition, at the time Sgt. Retzki entered Ms. Cooper's home, the police had not spoken with her to begin investigating her for operating while under the influence of an intoxicant. At the time Sgt. Retzki entered Ms. Cooper's home, he was investigating her for a hit-and-run offense, which here was simply a forfeiture. The hit-and-run was a relatively minor single-vehicle accident with no injuries, and in order to definitively tie Ms. Cooper to the offense, Sgt. Retzki needed to speak with her.

Assuming that probable cause existed to suspect Ms. Cooper of committing a crime before Sgt. Retzki entered her home, there were no exigent circumstances here that could justify the warrantless entry. Sgt. Retzki was not engaged in hot pursuit, as he had not immediately and continuously pursued Ms. Cooper from the scene.[74] Nor would investigating the hit-and-run justify the police's warrantless entry into Ms. Cooper's home, as this was simply an offense for failing to leave name at the scene of the accident at that point.[75] Nor could he fear that Ms. Cooper would escape, as she was in her home. Furthermore, there

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[73] R.62 at 10.
[74] ***State v. Richter***, 2000 WI 58, ¶ 32, 235 Wis. 2d 524, 612 N.W.2d 29.
[75] ***Welsh v. Wisconsin***, 466 U.S. 740, 750 (1984) (holding that though probable cause existed to enter the defendant's home, the relatively minor OWI offense made the presumption of unreasonableness of the entry difficult to rebut).

was no great risk of evidence being destroyed—this was a hit-and-run offense, and the officer had already located the vehicle he believed to be involved. Lastly, there is no information in the record that Sgt. Retzki feared for Ms. Cooper's safety when he entered her residence. Accordingly, because no probable cause existed to enter Ms. Cooper's home, the State cannot rely upon exigent circumstances to justify the police's warrantless entry. Even if probable cause existed to arrest Ms. Cooper for a crime, there were no exigent circumstances here that would justify the intrusion into her home. Had the motion to suppress been granted in circuit court, Ms. Cooper would not have pled to the OWI offense.

## III. THE CIRCUIT COURT ERRED IN HOLDING MS. COOPER'S CONSENT WAS VOLUNTARY.

### A. Standard of Review

An appellate court reviews *de novo* a circuit court's legal conclusions.[76] An appellate court reviews a circuit court's findings on whether a person has voluntarily consented based on clearly erroneous review.[77]

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[76] ***Guzman***, 166 Wis. 2d at 586.
[77] ***State v. Johnson***, 2007 WI 32, ¶ 13, 299 Wis. 2d 675, 729 N.W.2d 182.

### B. Ms. Cooper's consent to blood testing was involuntary under *State v. Artic.*

The Fourth Amendment to the United States Constitution and Article 1, § 11 of the Wisconsin Constitution guarantee "[t]he right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures." The essential purpose of the prohibition against unreasonable searches and seizures is "to safeguard the privacy and security of individuals against arbitrary invasions by government officials."[78] Warrantless searches are *per se* unreasonable and therefore unlawful, subject to a few "well-delineated" exceptions.[79]

A blood draw conducted at the direction of the police is a search, subject to these constitutional reasonableness standards.[80] Here, no warrant was obtained for the search of Ms. Cooper's blood. Instead, the State relies on one of the "carefully drawn" exceptions to the warrant requirement of the Fourth Amendment—a search pursuant to voluntary consent.[81]

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[78] ***State v. Boggess***, 115 Wis. 2d 443, 448–49, 340 N.W.2d 516 (1983).
[79] ***State v. Williams***, 2002 WI 94, ¶ 18, 255 Wis. 2d 1, 646 N.W.2d 834 (internal citation omitted).
[80] "Such testing procedures plainly constitute searches of 'persons[.]' … Search warrants are ordinarily required for searches of dwellings, and, absent an emergency, no less could be required where intrusions into the human body are concerned." ***Schmerber v. California***, 384 U.S. 757, 767, 770 (1966).
[81] ***State v. Johnston***, 184 Wis. 2d 794, 806, 518 N.W.2d 759 (1994) (*citing* ***Schneckloth v. Bustamonte***, 412 U.S. 218, 219 (1973)).

When relying on consent, the burden is on the State to present clear and convincing evidence, "that consent to the blood draw was 'given in fact by words, gestures, or conduct' and that the consent was 'voluntary.'"[82] The State must first meet its burden to show consent-in-fact by the presentation of "positive evidence" of the defendant's choice.[83] If it has met this initial burden, it must then also present evidence that the defendant's consent-in-fact was "an essentially free and unconstrained choice, not the product of duress or coercion, express or implied."[84]

Whether consent to search is voluntary cannot be determined by bright-line rules but requires courts to evaluate the totality of the circumstances.[85] In ***State v. Artic***, the Court set forth a non-exclusive list of factors to be considered in determining the voluntariness of consent to search:

> (1) whether the police used deception, trickery, or misrepresentation in their dialogue with the defendant to persuade him to consent;
> (2) whether the police threatened or physically intimidated the defendant or "punished" him by the deprivation of something like food or sleep;
> (3) whether the conditions attending the request to search were congenial, non-threatening, and cooperative, or the opposite;
> (4) how the defendant responded to the request to search;

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[82] ***State v. Blackman***, 2017 WI 77, ¶ 54, 377 Wis. 2d 339, 898 N.W.2d 774, *citing* ***State v. Artic***, 2010 WI 83, ¶ 29, 327 Wis. 2d 392, 786 N.W.2d 430 (emphasis added in ***Blackman***).
[83] ***Gautreaux v. State***, 52 Wis. 2d 489, 492, 190 N.W.2d 542 (1971).
[84] ***Blackman***, 2017 WI 77, ¶ 56 (internal citations and punctuation omitted).
[85] ***State v. Artic***, 2010 WI 83, ¶ 32, 327 Wis. 2d 392, 786 N.W.2d 430.

> (5) what characteristics the defendant had as to age, intelligence, education, physical and emotional condition, and prior experience with the police; and
> (6) whether the police informed the defendant that he could refuse consent.[86]

In addition to these factors, the Wisconsin Supreme Court has noted that the State's burden to show voluntary consent is "more difficult" when the defendant is in custody at the time that consent is given.[87]

Although Wisconsin's implied consent law[88] indicates that Wisconsin drivers "are deemed to have given consent" to evidentiary chemical testing, this "implied consent" cannot be read as a *per se* method of satisfying the constitutional requirement of voluntary consent. Rather, the implied consent law serves to "provide[] an incentive for voluntary chemical testing, *i.e.*, not facing civil refusal procedures and automatic revocation[.]"[89] In ***State v. Padley***, the Court of Appeals clearly explained the distinction between "implied consent" and "voluntary consent":

> There are two consent issues in play when an officer relies on the implied consent law. The first begins with the "implied consent" to a blood draw that all persons accept as a condition of being licensed to drive a vehicle on Wisconsin public road ways. The existence of this "implied consent" does not mean that police may require a driver to submit to a blood draw. Rather, it means that, in situations specified by the legislature, if a

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[86] ***Id.*** ¶ 33, *citing* ***State v. Phillips***, 218 Wis. 2d 180, 577 N.W.2d 794 (1998) (formatting added).
[87] ***Gautreaux v. State***, 52 Wis. 2d at 492.
[88] Wis. Stat. § 343.305 (2016–17).
[89] ***State v. Marshall***, 2002 WI App 73, ¶ 13, 251 Wis. 2d 408, 642 N.W.2d 571.

> driver chooses not to consent to a blood draw (effectively declining to comply with the implied consent law), the driver may be penalized. This penalty scenario for "refusals" created by the implied consent law sets the scene for the second consent issue.
>
> The State's power to penalize a refusal via the implied consent law, under circumstances specified by the legislature, gives law enforcement the right to force a driver to make what is for many drivers a difficult choice. The officer offers the following choices: (1) give consent to the blood draw, or (2) refuse the request for a blood draw and suffer the penalty specified in the implied consent law. When this choice is offered under statutorily specified circumstances that pass constitutional muster, choosing the first option is voluntary consent.[90]

More recently, Wisconsin Supreme Court Justice Kelly explained that the implied consent law is, "part of a mechanism designed to obtain indirectly what it cannot (and does not) create directly—consent to a blood test."[91] The statutory mechanism exists to "cajole drivers into giving … real consent" and "punishes a driver by revoking his operating privileges if he refuses an officer's request for a blood sample."[92]

Perhaps because the implied consent law is "not a model of clarity,"[93] some have argued that choosing to travel on a Wisconsin

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[90] ***State v. Padley***, 2014 WI App 65, ¶¶ 26–27, 354 Wis. 2d 545, 849 N.W.2d 867
[91] ***State v. Brar***, 2017 WI 73, ¶ 56, 376 Wis. 2d 685, 898 N.W.2d 499 (Kelly, J., concurring).
[92] ***Id.***
[93] ***Id.*** ¶ 49 (Kelly, J., concurring).

highway is itself voluntary, constitutional consent to a blood draw.[94] Yet this theory is not supported by the current state of Wisconsin caselaw. In ***State v. Blackman***, the State argued that ***Padley***'s discussion of voluntary consent was erroneous, and that the defendant had voluntarily consented simply by driving on the highway.[95] The majority in ***Blackman*** acknowledged the State's argument in a footnote and proceeded to thoroughly analyze the voluntariness of the defendant's consent at the time of his conversation with the police, rather than simply deeming the consent to have occurred by virtue of his travelling on the highway.[96] Although a concurring opinion was filed, suggesting that two of the justices might have been sympathetic to the State's argument,[97] the four-justice majority, as well as the one-justice dissent conducted their analyses consistently with the framework set forth in ***Padley***.[98] Therefore, the ***Padley*** framework continues to be binding precedent, and any voluntariness analysis must center on the interactions between the defendant and law enforcement at the time that his or her consent is requested.

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[94] *See, e.g.*, ***State v. Howes***, 2017 WI 18, ¶ 85, 373 Wis. 2d 468, 893 N.W.2d 812 (Gableman, J., concurring).
[95] ***Blackman***, 2017 WI 77, ¶ 54, n.20; *see also* *Brief and Supplemental Appendix of Plaintiff-Appellant-Petitioner* (*sic.*) for ***State v. Blackman***, *accessible at* https://wscca.wicourts.gov/caseDetails.do?caseNo=2015AP000450.
[96] ***Blackman***, 2017 WI 77, ¶¶ 54–67.
[97] ***Id.*** ¶ 89 (Ziegler, J., concurring).
[98] ***Id.*** ¶¶ 54–67, 117–22.

Another facet to the analysis of voluntary consent is that, in the clear majority of Wisconsin OWI cases, the defendant is never actually asked to "consent" to a search. The script used by most Wisconsin law enforcement officers, which was indeed used in this case, asks if the defendant will "submit to an evidentiary chemical test" of his or her blood. "Submit" might commonly be defined as to "yield oneself to the authority or will of another…surrender…to permit oneself to be subjected to something."[99] This choice of words, suggesting submission to authority rather than voluntary consent, does not adequately convey to the defendant the freedom to make the "difficult, but permissible choice" between providing or withholding consent to a warrantless search.[100]

The law is well established that the "orderly submission" or "acquiescence" of a citizen to a police officer's request does not, standing alone, establish voluntary consent to search.[101] For example, in ***State v. Johnson***, voluntary consent was not found when the defendant stated, "I don't have a problem with that" in response to a law enforcement officer's declared intention to search his vehicle.[102]

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[99]Webster's Third New International Dictionary (1993), *available at* http://www.mirriam-webster.com/dictionary/submit.
[100] ***Padley***, 2014 WI App 65, ¶ 28.
[101] *See* ***Amos v. United States***, 255 U.S. 313 (1921); ***Johnson v. United States***, 333 U.S. 10 (1948); ***Bumper v. North Carolina***, 391 U.S. 543 (1968); ***State v. Geibel***, 2006 WI App 239, 297 Wis. 2d 446, 724 N.W.2d 402.
[102] ***State v. Johnson***, 2007 WI 32, 299 Wis. 2d 675, 729 N.W.2d 182.

On January 5, 2017, Officer Krzykowski arrived at Ms. Cooper's home to investigate a traffic accident.[103] After the investigation, he arrested Ms. Cooper for OWI.[104] Ms. Cooper was handcuffed and placed in the back seat of the squad car before being asked to submit to a blood test.[105] Officer Krzykowski read the Informing the Accused form verbatim, and Ms. Cooper gave an affirmative response when asked to submit to the test.[106]

The existence of the implied consent law does not shift the burden of proof to the defendant when she challenges whether she voluntarily consented to a search. Rather, the implied consent law is a penalty structure that requires the defendant to make a difficult choice. The State retains the burden of presenting positive evidence, to a clear and convincing standard, that the defendant did not simply acquiesce to a display of police authority but made "an essentially free and unconstrained choice, not the product of duress or coercion, express or implied."[107]

The State has not attempted to meet its burden other than by stipulating that Ms. Cooper was asked to "submit" to a test, and that

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[103] R.62 at 4–5.
[104] R.62 at 19.
[105] R.62 at 21.
[106] R.62 at 20–21.
[107] ***Blackman***, 2017 WI 77, ¶ 56 (internal citations and punctuation omitted).

she indicated she would.[108] This scenario is analogous to ***State v. Johnson***, where the defendant said, "I don't have a problem with that," in response to a law enforcement officer's declared intention to search his vehicle.[109] In ***Johnson***, the Court noted that the defendant was not actually asked to provide consent to a search.[110] Likewise, Ms. Cooper was not asked to consent to search but was asked if she would submit. If the police intend to ask for voluntary consent, rather than a submission or acquiescence to authority, then they should ask for voluntary consent, not submission.

In addition, the Court should consider Ms. Cooper's personal characteristics in determining whether any consent was voluntarily provided.[111] At the time the police obtained her consent to blood testing, Ms. Cooper had been reluctant to submit to any police interaction.[112] She repeatedly told the police she did not want to be there, and that she wanted to walk away.[113] Officer Krzykowski also testified she acted oddly at times, even bursting into laughter.[114] There is also her extraordinarily high blood alcohol content, which was likely higher than a .33 BAC level at the time she interacted with the

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[108] R.62 at 21.
[109] ***Johnson***, 2007 WI 32, ¶ 19.
[110] ***Id***.
[111] ***State v. Artic***, 2010 WI 83, ¶ 29.
[112] R.62 at 23–24.
[113] R.62 at 23–24.
[114] R.62 at 24.

police.[115] Lastly, there is the fact that she allowed a complete stranger to enter her home while she was alone—behavior that indicates she was not thinking clearly.[116]

Moreover, the State has not presented any evidence to suggest that Ms. Cooper has a greater-than-average knowledge of the law or of legal principles. These characteristics favor a finding that she did not voluntarily consent to the search.

In conclusion, the evidence in this case establishes that Ms. Cooper, an average woman, while handcuffed, permitted the government to collect her blood. There is nothing in the record to demonstrate that she voluntarily consented to blood testing. The State has chosen to rely on a bare-bones record, which, if found to be sufficient here, would render the legal distinction between acquiescence and voluntary consent hopelessly blurred. Because the State has not met its burden, the Court must find that Ms. Cooper did not voluntarily consent to blood testing. All evidence derived from the collection and analysis of her blood sample should have been suppressed. Had the motion to suppress been granted in circuit court, Ms. Cooper would not have pled to the OWI offense.

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[115] R.62 at 25.
[116] R.62 at 8; R.62 at 13–14.

## CONCLUSION

The police's entry into Ms. Cooper's home was unlawful, and any evidence derived after that point must be suppressed. Because there is no showing that Ms. Cooper even knew Sgt. Retzki was an officer, she could not have knowingly consented to his entry in the home. Nor were there exigent circumstances that would have justified his entry into her home without a warrant. Had the police not unlawfully entered her home, there would have been little evidence against her, and Ms. Cooper would not have entered a plea to the OWI.

In addition, Ms. Cooper could not have voluntarily consented to the blood draw. Ms. Cooper was extremely intoxicated and could not therefore give constitutional consent under the Fourth Amendment. Moreover, other factors, such as her extreme reluctance to submit to the police investigation, indicate she merely acquiesced in submitting to the blood draw. Suppressing the test result here would result in reversing Ms. Cooper's conviction. Had the test result been suppressed, she would not have entered a plea to the OWI.

Dated at Madison, Wisconsin, September 19, 2018.

Respectfully submitted,

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