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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2018AP1455

In the Matter of the Refusal of Danny L. Waters:
STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DANNY L. WATERS,

Defendant-Appellant.

ON APPEAL FROM A FINDING THAT THE
DEFENDANT UNLAWFULLY REFUSED AN IMPLIED
CONSENT TEST, ENTERED IN THE LA CROSSE
COUNTY CIRCUIT COURT CASE 18-TR-201, THE
HONORABLE SCOTT L. HORNE, PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

- I. WATERS DID NOT WAIVE THE
CLAIM THAT HIS ARREST WAS
UNLAWFUL OR ALLEVIATE THE
STATE’S BURDEN TO PROVE THE
ARREST WAS LAWFUL**

The issues triggered by a request for a refusal hearing are set forth by statute. *In re the Refusal of Anagnos*, 2012 WI 64 ¶ 25, 341 Wis. 2d 567, 588, 815 N.W.2d 675 (2012). The issues are: (1) “whether the officer had probable cause to believe that the defendant was driving or operating under the influence...and whether the person was lawfully placed under arrest...”; (2) whether the officer...[read the informing the accused to the defendant]”; and (3) “whether the person refused to permit the test.” Wis. Stat. § 343.305(9)(a)5. At a refusal hearing the burden is on the State to establish these statutory bases for the revocation. *See, i.e., In re Smith*, 2008 WI 23, ¶ 15, 308 Wis. 2d 65, 74, 746 N.W.2d 243 (2008).

The State does not argue that Mr. Waters was lawfully placed under arrest, but rather that it should not have to establish the lawfulness of Mr. Waters’ arrest, arguing Mr. Waters forfeited that issue. However, Mr. Waters raised the issue by requesting a refusal hearing and, as will be further explained below, never thereafter waived or conceded the lawfulness of his arrest, including whether constitutional violations invalidated the arrest.

- a. By filing a request for a hearing, Mr. Waters put the State on notice that it had the burden of establishing the statutory basis for the refusal, including the lawfulness of the arrest.**

The State claims that Mr. Waters waived his challenge to the lawfulness of his arrest because “prior to the refusal hearing, Waters filed no written motion alleging violations of his constitutional rights, including, but not limited to, police entering his home” (Brief of Respondent: 4). Mr. Waters was entitled to a hearing on all issues pertaining to Wis. Stat. § 343.305(9)(a)5 so long as he requested a hearing in writing. Wis. Stat. § 343.305(9)(a)4. At a refusal hearing the burden is on the state to establish the statutory basis for the revocation. *In re Smith*, 2008 WI 23 at ¶ 15. Constitutional violations occurring prior to arrest can render the arrest unlawful for purposes of the refusal statute. *Anagnos*, 2012 WI 64 at ¶ 41. It is undisputed that the defendant timely requested a refusal hearing. The State’s contention that something more was needed to raise the issue that the arrest was not lawful is contrary to the refusal statute and without legal authority.

Likewise, in arguing the State need not prove the legality of Mr. Water’s arrest, the State points out the immaterial fact that “at the commencement of the refusal hearing, Waters did not indicate any intent to challenge the legality of police contact with him at his home.” The hearing commenced with the State calling its first witness (17:3), as the State had the burden of demonstrating all the criteria of the statute. Adopting the State’s reasoning here would mean the defendant waived every statutory issue at the hearing by

the time the State called its first witness, which ignores the burden of proof and the plain language of Wis. Stat. § 343.305(9)(a)4. The statute does not require that Mr. Waters specifically list his challenge to the revocation prior to the evidentiary hearing.

b. Stipulating that Waters was read the *Informing the Accused* and refused the test highlighted rather than forfeited the issues regarding the lawfulness of the arrest

The State further contends that by Waters stipulating that the informing the accused was read and that he refused the test, the State was misled into believing that it need not prove the legality of Mr. Waters' arrest (Brief of Respondent: 4). The State's argument ignores the context of the stipulation. Prior to the stipulation, the State asked the officer questions about the investigation at the scene of the accident (17:4-6). The State then questioned the officer about proceeding into Mr. Waters' home and conducting an investigation there (17:6-11). Finally, the State asked the officer to sum up the evidence and then confirmed that the officer placed Mr. Waters under arrest (17:11-12).

The State then asked the officer "where did you transport [Mr. Waters] *after* placing him under arrest?" (17:12)(emphasis added). It was only then that Waters indicated he would stipulate that the informing the accused

was read and that Mr. Waters refused the test (17:12). At the time of the stipulation it was obvious that the state was shifting gears from the lawfulness of the arrest to the other two criteria. It is therefore unreasonable to conclude that Mr. Waters subsequent stipulation pertained to the lawfulness of his arrest. Rather he was explicitly stipulating to the criteria in § 343.305(9)(a)5.b and § 343.305(9)(a)5.c and thus limiting the issues to § 343.305(9)(a)5.a, which explicitly includes the lawfulness of the arrest (17:4).

c. Waters argued that his arrest was unlawful and therefore did not waive the issue.

The State's purported surprise that Mr. Waters was challenging law enforcement's conduct in entering his home and arresting him is undermined by the fact that it is the only challenge Mr. Waters made (17:23).

Through counsel, Mr. Waters asked a number of questions that pertained chiefly to whether the investigation at the scene of the accident provided sufficient probable cause to extend the investigation into Mr. Waters' home: Mr. Waters' demeanor at the scene of the accident (17:13-14); the weather [as an innocent explanation for Mr. Waters wanting to address the accident in the morning] (17:14); lack of slurred speech or indicia of intoxication observed by witnesses at the scene (17:14); and nothing specific about the accident

suggesting intoxication (17:15). Mr. Waters also questioned the officer about his failure to provide a recording of the encounter at Mr. Waters' home (17:16).

Then, after the evidentiary portion of the hearing, Mr. Waters never argued that the totality of the circumstances observed by the officer were insufficient to give rise to probable cause to believe that Mr. Waters was operating while intoxicated. Mr. Waters never argued the insufficiency of the field sobriety tests and other observations reportedly observed while inside Mr. Waters' home. Rather Mr. Waters pointed out the lack of information *at the scene of the accident* that would give rise to probable cause that he had committed a crime and then stated, "*I would simply argue that...[law enforcement]...didn't have the requisite level of suspicion to go to Mr. Waters' house at that hour and question him about the incident*" (17:23). While the argument is not as elaborate as it is in Mr. Waters' brief, it clearly demonstrates that Mr. Waters challenged the lawfulness of his arrest, specifically as it pertained to the constitutionality of the conduct occurring at Mr. Waters' home.

The State then suggests that by challenging the constitutionality of going "to" Mr. Waters' home to question him forfeits a challenge to the constitutionality of going *in* Mr. Waters home to question him (Brief of Respondent: 10).

There is no constitutional implication to the police doing nothing more than going “to” a home. *See, i.e., State v. Stout*, 2002 WI App 41, ¶ 18, 250 Wis. 2d 768, 641 N.W. 2d 474 (2002). The argument to the circuit court was that the evidence produced at the hearing did not establish that what the officer testified to doing at Mr. Waters’ home was constitutionally justified by the information they gained at the scene. The only reasonable way to interpret that argument is that the defendant was challenging, rather than conceding, that he was lawfully placed under arrest.

CONCLUSION

For the above-stated reasons, the defendant-appellant respectfully requests that the trial court’s order finding that he unlawfully refused an implied consent test be REVERSED.

Dated this 11th day of December, 2018.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: 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 and maximum of 60 characters per line of body text. The length of the brief is 1,917 words.

Dated this 11th day of December, 2018.

Signed:

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**CERTIFICATE OF COMPLIANCE
WITH 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 11th day of December, 2018.

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