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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II
Case No. 2019AP1144-CR

STATE OF WISCONSIN,

Petitioner-Appellant,

v.

DAWN J. LEVANDUSKI,

Defendant-Respondent.

BRIEF OF RESPONDENT

ON APPEAL FROM AN ORDER GRANTING A MOTION TO SUPPRESS EVIDENCE ENTERED IN THE OZAUKEE COUNTY CIRCUIT COURT, THE HONORABLE TIMOTHY VAN AKKEREN, PRESIDING.

OZAUKEE COUNTY CASE NO. 2018CT000238

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STATEMENT OF THE ISSUES

Dawn Levanduski was arrested for Operating while Intoxicated (OWI) Second Offense. The arresting officer read Levanduski the Informing the Accused form as required by statute. Specifically, Levanduski was informed that if she exercised her Fourth Amendment right to be secure in her person from an invasive blood draw, that decision could be used against her in court. Levanduski subsequently offered the officer a blood sample.

1. Does Levanduski have a constitutional right to be free in her person from an invasive blood draw?

The circuit court answered "yes." The court found that the Fourth Amendment guarantees people a constitutional right to be secure in their person and therefore they have the right to refuse a request by law enforcement for a blood sample. The court further ruled a person's exercise of a constitutional right cannot be used against them in criminal proceedings.

2. Did threatening to use Levanduski's refusal to provide a blood sample against her in court render her consent involuntary?

The circuit court answered "yes." The exercise of a constitutional right cannot later be used against a person at trial. Because Levanduski had a constitutional right to be secure in her person and could not be forced to submit to a warrantless search of it, the prosecution may not use that refusal against her at trial. The threat of such action renders Levanduski's consent involuntary.

STATEMENT ON ORAL ARGUMENT

Respondent Dawn J. Levanduski does not believe that oral argument is necessary, unless the Court concludes that the written briefs have not fully and adequately presented the issues and the arguments of the parties.

STATEMENT ON PUBLICATION

Respondent Dawn J. Levanduski believes that the court of appeals should publish its decision in an effort to provide clarity and guidance to the circuit courts on the issues raised herein.

STATEMENT OF THE CASE AND FACTS

According to the probable cause portion of the Amended Criminal Complaint in this case, the following events occurred:

> Complainant alleges that on May 24, 2018 at approximately 5:53 p.m., Officer Caswell, Sergeant Ramthun and Officer Depies were dispatched to the Kwik Trip located at 750 East Green Bay Avenue in the Village of Saukville, Ozaukee County, Wisconsin. They were sent there for the report of an intoxicated female attempting to get gas. A description of the female and her vehicle were given. The female suspect was said to be in the store buying a hamburger and she urinated herself.
>
> When Officer Depies arrived he found the described female in the driver's seat of the described vehicle with the engine running and eating a hamburger. That female was the defendant Dawn Levanduski. She had a strong odor of intoxicants emanating from her breath, slurred speech and glassy eyes. Officer Depies asked her if she had anything to drink and the defendant ultimately said three pint size beers. She admitted to driving to Kwik Trip. Office Caswell also obtained video surveillance recordings of the defendant arriving at the Kwik Trip driving her vehicle.
>
> The defendant was asked to step out of her vehicle and walk to the rear of her vehicle. She had a lack of balance and swayed while standing. She also had a wet area in the crotch of her shorts. She performed field sobriety tests. In a horizontal gaze nystagmus test, Officer Depies observed the lack of smooth pursuit in both eyes, jerkiness at maximum deviation in both eyes and the onset of jerkiness prior to 45 degrees in both eyes. In a walk and turn test, Officer Depies observed that the defendant could not keep balance while listening to instructions, did not touch heel to toe and stepped off the line. In a one leg stand test, Officer Depies observed the defendant put her foot down three times as she lost her balance.
>
> The defendant was arrested for Operating while Intoxicated and taken to Aurora Medical Center in Grafton for a blood draw. She consented to the draw and a sample of her blood was taken. It was packaged for delivery to the state lab of

> hygiene. The Wisconsin State Lab of Hygiene analyzed the Defendant's blood and the lab report stated that the Defendant had a blood alcohol content of 0.269.

(R. 9: 1-3.)

As laid out in her motion to suppress, Levanduski was read the Informing the Accused form prior to her consent to the blood draw:

> At the time of the request for the evidentiary blood draw pursuant to the OWI arrest for OWI Second Offense by Officer Brandin Depies of the Saukville PD on May 24, 2018 at 6:25 p.m., Officer Depies read the defendant the Informing the Accused and asked the defendant whether she would submit to a blood draw. In the informing the accused, the officer read to the defendant that: "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 result or the fact that you refused testing can be used against you in court." The defendant responded that she will consent to the blood draw after being apprised of this information by the police officer.

(R. 10:2.)

The State charged Levanduski with OWI as a second offense. (R. 9:1.) She moved to suppress the blood test results on the ground that her consent to the blood draw was involuntary. (R. 10:1-5.) Levanduski argued that when Officer Depies read her the Informing the Accused form, he threatened that if she refused to provide a blood sample, her refusal could be used against her in court in violation of her constitutional right to refuse a blood draw. (R. 10:1-5.)

The Ozaukee County circuit court, Reserve Judge Timothy M. Van Akkeren presiding, granted Levanduski's motion after briefing. (R. 13:1-2.) The court reasoned that Levanduski's consent to provide a blood sample was involuntary,

because the officer incorrectly told her that a refusal could be used against her in court. (R. 21: 7-9.) The circuit court suppressed all evidence derived from the blood draw. (R. 13:1-2.)

The State then appealed the decision of the circuit court.

ARGUMENT

Introduction

The United States Supreme Court and the Supreme Court of Wisconsin both have held that a person has a Fourth Amendment privacy right to be free from intrusions into his or her body. Because of this constitutional protection, a person may refuse to submit to a warrantless request from officers of the law for a sample of their blood after arrest for an OWI without apprehension of criminal penalty attaching to this refusal. The State cannot use a person's exercise of a constitutional right against them as evidence of guilt at trial in a criminal court. Allowing the State to even comment on the decision to refuse would eradicate the value of such a constitutional protection.

In the instant case, Levanduski was arrested for a second offense OWI, and was read the Informing the Accused form, which stated that if she refused to provide a blood sample to a requesting law enforcement officer, such refusal would be used against her at trial. This threat having been thrust upon her, Levanduski agreed to provide a blood sample. Levanduski was forced to choose between exercising her

constitutional right to refuse a warrantless blood test, thereby facing the prospect of the refusal's being used against her in court, or agreeing to the test. The threat to use her exercise of her constitutional right against her at trial was coercive, thus rendering her consent involuntary.

This Court should uphold the circuit court's order granting Levanduski's motion to suppress the result of her blood test.

Standard of Review

This Court reviews a motion to suppress applying a two-step standard of review. *State v. Sloan*, 2007 WI App 146, ¶ 7, 303 Wis. 2d 438, 736 N.W.2d 189. This Court will uphold the circuit court's factual findings unless they are clearly erroneous. *State v. Eason*, 245 Wis. 2d 206, ¶ 9, 629 N.W.2d 625. Then, the application of constitutional principles to those facts is reviewed de novo. *Id.*

This Court reviews the voluntariness of consent to a search in a similar manner. *State v. Artic*, 2010 WI 83, ¶ 23, 327 Wis. 2d 392, 786 N.W.2d 430. The circuit court's findings of historical fact are reviewed to determine whether they are clearly erroneous. *Id.* Then, this Court independently applies constitutional principles to those facts. *Id.*

I. BECAUSE LEVANDUSKI HAS A CONSTITUTIONAL PRIVACY RIGHT AGAINST BODILY INTRUSIONS BY THE STATE, SHE MAY EXERCISE THAT RIGHT WITHOUT IT BEING USED AGAINST HER IN A CRIMINAL PROSECUTION.

A. The United States Supreme Court and the Supreme Court of Wisconsin both have held that even under implied consent laws, individuals have a constitutional right to withhold consent to a warrantless blood draw under the Fourth Amendment right to privacy.

The Fourth Amendment of the United States Constitution provides that "[t]he 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 warrant shall issue, but upon probable cause[.]" A warrantless search of a person is reasonable only if it falls within a recognized exception. *United States v. Robinson*, 414 U.S. 218, 224, 94 S.Ct. 467 (1973). Absent a recognized exception, law enforcement officers must obtain a warrant prior to a search, including procuring a blood sample from a person arrested for OWI. The invasion of bodily integrity that a blood draw entails, impacts an individual's "most personal and deep-rooted expectations of privacy." *Winston v. Lee*, 470 U.S. 753, 760, 105 S.Ct. 1611 (1985); see also *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 616, 109 S.Ct. 1402 (1989).

The case law addressing implied consent laws and the taking of blood from a person arrested for an OWI has developed substantially over the past several years. In light of the large amounts of information that can be adduced from a single blood

sample, the United States Supreme Court, as well as state courts, has recognized the need for significant constitutional protections in the context of blood draws.

The U.S. Supreme Court first examined the Fourth Amendment implications of blood draws in OWI cases in *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826 (1966). In that case, the Court rejected the petitioner's claim that use of his refusal to provide a blood sample against him in court was a violation of his Fifth Amendment rights. The *Schmerber* Court did recognize, however, that a blood draw "plainly involves the broadly conceived reach of a search and seizure under the Fourth Amendment." *Id.* at 767. A blood test "plainly constitutes searches of a 'person'. . . within the meaning of that Amendment." *Id.* Noting that "[s]earch warrants are ordinarily required for searches of dwellings, " the Court reasoned that "absent an emergency, no less could be required where intrusions into the human body are concerned." *Id.* at 770. The importance of requiring that a warrant be issued by a neutral, detached magistrate was "indisputable and great." *Id.* The Court in *Schmerber,* came to the conclusion that the natural dissipation of alcohol from a person's blood, represented the destruction of evidence through a natural process, and, therefore, was the type of emergency that would allow police to obtain a blood sample absent a warrant. *Id.* at 770-771.

However, the notion that the dissipation of alcohol in a person's blood presented a per se exigent circumstance was later rejected in *Missouri v. McNeely*, 569 U.S. 141, 133 S.Ct. 1552 (2013). Concerned with the need to procure a blood

sample in accordance with the protections of the Fourth Amendment, the *McNeely* Court held that when police officers can reasonably obtain a search warrant prior to taking a blood sample, they must do so. *Id.* at 152. The Court explicitly rejected the argument that the application of a traditional Fourth Amendment analysis was not appropriate in such a situation. *Id.* at 160. In holding that a Fourth Amendment totality-of-the-circumstances analysis must be applied, the *McNeely* Court recognized that all defendants, even those suspected of operating a motor vehicle while intoxicated, have a constitutional privacy right in their blood.

In *South Dakota v. Neville*, 459 U.S. 553 (1983), the U.S. Supreme Court addressed the issue that remained untouched in *Schmerber*: whether the State's use of a person's refusal to consent to a blood draw against them at trial violates the Fifth Amendment. The *Neville* Court held that such use by the State does not violate the Fifth Amendment. *Id.* at 554. In light of the holding in *Schmerber*, the *Neville* Court held that refusal to provide a blood draw may be used against a person at trial without violating that person's right against self-incrimination. *Id.* at 566.

However, the *Neville* decision only addressed the narrow issue of whether the use of a defendant's refusal of a blood test against that defendant in court was a violation of their right against self-incrimination under the Fifth Amendment, not whether the exercise of a constitutional right could be used against that person. In the present case, Levanduski is not making a challenge on Fifth Amendment grounds, but, rather, she is arguing that she has a Fourth Amendment right to be

secure in her person and effects. The State argues that the holding in *Neville* also "applies to the Fourth Amendment," (State's Brief, p. 13.) but the *Neville* holding must be seen as limited to a Fifth Amendment analysis. Regardless, the *Neville* holding has been called into question recently by the Wisconsin Supreme Court:

> *Neville* was decided pre-*McNeely* and pre-*Birchfield*. Both *McNeely* and *Birchfield* have had a significant effect on drunk driving law, and highlight the constitutional nature of a blood draw. Both cases analyze breath and blood tests as Fourth Amendment searches and appear to supersede the statement from the Fifth Amendment *Neville* case[.]

State v. Dalton, 2018 WI 85, ¶ 61, n. 10, 383 Wis. 2d 147, 914 N.W.2d 120.

The *Neville* Court did posit that a defendant "has no constitutional right to refuse a blood-alcohol test." *Neville* at 560, n. 10. However, this statement cannot mean that a person has *no* constitutional right to refuse a blood test by the present standard. The Court's statement means either that a person does not have a Fifth Amendment right to refuse, as that was the issue before the Court in *Neville*, or recent cases have effectively overruled this holding. Under the Fourth Amendment, however, a person does have a constitutional right to withhold consent to a warrantless search of their blood.

In *McNeely*, the Court weighed the State's interest in combating drunk driving against the rights of the individual. *Id.* at 160-161. Referencing a Review put out by the National Highway Safety Administration (NHSTA), the *McNeely* Court noted that "most States allow the motorist's refusal to take a BAC test to be used as evidence against him in a subsequent criminal prosecution." *Id.* at 161. The

Court cited *Neville* in holding that such use was not a violation of the Fifth Amendment right against self-incrimination. *Id.* However, the *McNeely* Court made no holding as to whether or not the use of a refusal at trial was a violation of a Fourth Amendment right, as the issue was not before the Court.

The issue in *McNeely* was whether the dissipation of alcohol from a person's blood represented a per se exigent circumstance, whereas the issue of whether the adverse use in court of a refusal to submit to a blood draw violated a defendant's constitutional right to refuse under the Fourth Amendment was not before the Court.

Three years after *McNeely*, the Court decided *Birchfield v. North Dakota*, and its holding caused a paradigm shift in the analysis of OWI investigations in relation to Fourth Amendment. *Birchfield v. North Dakota*, 136 S.Ct. 2160 (2016). *Birchfield* examined whether a person could be criminally prosecuted for refusing to provide a breath or blood sample subsequent to an OWI arrest. *Id.* The Court held that while a warrantless breath test does not implicate Fourth Amendment privacy rights, a warrantless blood test does. *Id.* at 2185. The *Birchfield* Court found that whereas a breath test involves a very minor intrusion on privacy, a blood test involves the piercing of the skin and the extraction of blood from within a person's body. See *Id.* at 2178 (internal citation omitted). Furthermore, unlike a breath test, which only provides blood-alcohol content information, a blood draw may provide a great deal of information beyond blood-alcohol content. *Id.* The Court in

Birchfield concluded "that motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense." *Id.* at 2186.

The *Birchfield* Court acknowledged that the evidentiary consequences of a refusal were not before it, only whether a stand-alone criminal charge could be levied against a person for refusing a breath or blood test. *Id.* at 2185. The *Birchfield* Court did not cast doubt on the overall soundness of implied consent laws, but at the same time it cautioned that "[t]here must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads." *Id.* The State concludes that because the United States Supreme Court did not expressly prohibit a government action that was not before it (using a refusal as evidence at trial), that the action must therefore be constitutional. (State's Brief, 31.) This cannot be the case, as to use a refusal to provide a blood sample as evidence of guilt at a criminal trial is not merely an evidentiary consequence, but a way to circumvent the holding in *Birchfield* that a person may not suffer criminal penalties for refusing to provide a sample of their blood. *Birchfield* at 2186.

The State argues that the holding in *Birchfield* is limited only to that a refusal to provide a blood test cannot be a stand-alone criminal charge. This argument ignores the underlying reasons the *Birchfield* Court decided as it did. The reason a refusal to submit to a blood test cannot be criminally prosecuted is because the government may not criminally punish a person for exercising a constitutional right. *Birchfield* made this clear in its distinction between a breath test, in which a person

does not have a constitutional right to privacy, and a blood test, in which a person has a constitutional right to privacy. See *Id.* at 2178 (internal citation omitted).

Since the circuit court's decision granting Levanduski's motion to suppress evidence obtained from testing her blood, the U.S. Supreme Court has affirmed its holding that a person has a constitutional right to the privacy of their blood in *Mitchell v. Wisconsin*, 139 S.Ct. 2525 (2019). The issue in *Mitchell* was whether a warrantless blood draw of an unconscious person was constitutionally sound under the exigent circumstance exception to the warrant requirement. *Id.* at 2530. Exigent circumstances are not at issue here. However, the *Mitchell* Court reinforces that, because a person has a privacy interest in their blood, a Fourth Amendment analysis is necessary when obtaining a blood sample from a person: quoting *Birchfield*, the *Mitchell* Court made clear that blood "tests are 'searches.'" *Id.* at 2533 (internal citations omitted).

B. As with any other warrantless search, an individual has the constitutional right to withhold consent when law enforcement requests to perform a warrantless search, even when that individual is suspected of driving while impaired and law enforcement's request is for a sample of the individual's blood.

The Wisconsin Supreme Court adopted the holding in *Birchfield* in *State v. Dalton*, 2018 WI 85. In *Dalton*, the Wisconsin Supreme Court applied the holding in *Birchfield* to situations where a person is not criminally charged with a refusal to

submit to a blood test but nonetheless faces criminal penalties. Dalton was arrested for OWI and law enforcement officers requested he provide a blood sample. *Id.* at ¶ 13. He refused. *Id.* Law enforcement officers nevertheless obtained a blood sample under the exigent circumstances exception to the Fourth Amendment warrant requirement and Dalton was ultimately convicted of OWI. *Id.* at ¶¶14, 19. At sentencing, the circuit court explicitly stated that Dalton would receive a higher sentence for refusing to provide a blood sample, informing Dalton, "You don't have a right not to consent." *Id.* at ¶ 21.

On appeal, Dalton argued "that the circuit court impermissibly lengthened his sentence because he refused a warrantless blood draw, thereby violating *Birchfield*." *Id.* at ¶ 55. The Wisconsin Supreme Court agreed thereby rejecting the circuit court's conclusion that Dalton did not have a right to refuse a warrantless search of his blood. The Court held that applying a harsher sentence for an OWI when the person refused to submit to a blood test was unconstitutional. *Id.* at ¶ 67. The Court explicitly held that by refusing to provide a blood sample to law enforcement, the defendant was "exercising his constitutional rights." Id. at ¶ 61. The Court spoke in unambiguous language: a person arrested for an OWI has the constitutional right to refuse a warrantless search of their blood.

The State argued in *Dalton*, similarly as they do now, that because Wisconsin does not make a refusal a stand-alone crime, *Birchfield* does not apply. *Id.* at ¶ 63. The Court rejected this argument:

> The *Birchfield* court recognized that '[t]here must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive

> on public roads.' 136 S.Ct. at 2185. The limitation it established directs: no criminal penalties may be imposed for a refusal to provide a blood sample.

Id. at ¶ 66.

Using a person's refusal against them in court to argue they are guilty of a crime falls under the broad definition of a criminal penalty. *Birchfield* and *Dalton* make clear that this is not permissible under the Fourth Amendment.

C. Other states are divided on whether prosecutors may use the fact that a person arrested for an OWI refused to provide consent for a warrantless blood sample as evidence of guilt at trial.

The State has identified a number of other jurisdictions that have reached the conclusion that a person arrested for OWI who refuses to submit to a warrantless blood draw may have that fact used against them at trial. (State's Brief, p. 22.) The State indicates their research could find no other case that held to the contrary. (State's Brief, p. 26.) While the State calls attention to several cases that support its position, there are other cases from outside Wisconsin's jurisdiction that support the opposing position.

For example, the Kentucky Court of Appeals has held that use of refusal evidence violates the constitutional protection that motorists have under the Fourth Amendment. *McCarthy v. Commonwealth,* No. 2017-CA-001927-MR, 2019 WL 2479324, at *3–6 (Ky. Ct. App. June 14, 2019) (publication contingent on review by the Kentucky Supreme Court). The court concluded that "it is unconstitutional

to penalize a defendant for exercising his right to be free of warrantless searches by using the defendant's refusal of consent as evidence of guilt." Id. at *5. The Kentucky Court of Appeals' holding directly supports Levanduski's position: Using a person's refusal to consent to a blood test to prove guilt would violate her constitutional right to refuse to submit to a warrantless search. *Id.* at *3–7.

The Idaho Supreme Court also strongly suggested that a person arrested for an OWI had a constitutional right to refuse a warrantless blood draw. *State v. Jeske*, 164 Idaho 862, 436 P.3d 683 (2019). Relying on *McNeely* and *Birchfield*, the Idaho Supreme Court highlighted that the U.S. Supreme Court has "clarified that there is a constitutional right to refuse a warrantless blood draw." *Id.* at 868 (internal citations omitted). The court then moved on to the question of whether the prosecutor's commenting on a refusal was a constitutional violation. *Id.* The State conceded that it was improper for the prosecutor to make such comment, so the court assumed, without deciding, that there was a constitutional violation. *Id.*

Throughout its brief, the State attempts to frame the question at the heart of this appeal as whether a person has the constitutional right to refuse a warrantless search of their blood. That is not the question. The question is whether a person has a Fourth Amendment privacy interest in their blood. This is undeniably true. If a person has a constitutional privilege, then they have a right to exercise that privilege. The conclusion here is inevitable: Levanduski, as with every other individual, has a constitutional right to a privacy interest in her own blood and can exercise that right to be free from a warrantless search. Levanduski has the

constitutional right to withhold consent when asked to provide a sample of her blood and the exercise of that right cannot be used against her at a criminal trial.

II. LEVANDUSKI'S CONSENT TO PROVIDE A SAMPLE OF HER BLOOD WAS COERCED BY LAW ENFORCEMENT'S THREAT TO USE THE EXERCISE OF A CONSTITUTIONAL RIGHT AGAINST HER AND WAS THEREFORE INVOLUNTARY.

A. Because the government cannot use the exercise of a constitutional right against someone at trial, law enforcement cannot threaten that the exercise of a constitutional right can be used against a person at trial.

It is settled law that the government cannot unreasonably burden the exercise of a constitutional right. *United States v. Jackson*, 390 U.S. 570, 572 (1968). A defendant's invocation of a constitutional right cannot be used to imply guilt:

> I can think of no special circumstances that would justify use of a constitutional privilege to discredit or convict a person who asserts it. The value of constitutional privileges is largely destroyed if persons can be penalized for relying on them. It seems peculiarly incongruous and indefensible for courts which exist and act only under the Constitution to draw inferences of lack of honesty from invocation of a privilege deemed worthy of enshrinement in the Constitution.

Grunewald v. United States, 353 U.S. 391, 425-26 (1957) (Black, J., concurring).

A prosecutor cannot even create an inference against a defendant for exercising a constitutional right. *Griffin v. California*, 380 U.S. 609 (1965). Comment on the exercise of a constitutional right "is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its

assertion costly." *Id.* at 614.

Although *Griffin* focused on a defendant's right against self-incrimination, the reasoning behind the *Griffin* Court's holding that any comment pertaining to the exercise of the Fifth Amendment privilege is prohibited equally applies to the Fourth Amendment privilege of being allowed to refuse unreasonable searches and seizures. In discussing inferring consciousness of guilt, the Third Circuit of the United States Court of Appeals held that there is "little, if any, valid distinction between the privilege against self-incrimination and the privilege against unreasonable searches and seizures[.]" *United States v. Thame*, 846 F.2d 200, 206 (3d Cir. 1988). Similarly, the Ninth Circuit, in *United States v. Prescott*, 581 F.2d 1343 (9th Cir. 1978), compared the Fourth and Fifth Amendment privileges, holding that evidence should be equally as inadmissible in the case of silence as in the case of refusal to let an officer conduct a search. The court explained that "[i]f the government could use such a refusal against the citizen, an unfair and impermissible burden would be placed upon the assertion of a constitutional right and future consents would not be 'freely and voluntarily given.'" 581 F.2d at 1351.

Outside of an OWI context, federal courts of appeal have consistently concluded that proving guilt by using a person's refusal to submit to a warrantless search violates a defendant's Fourth Amendment rights. See, e.g., *United States v. Prescott*, 581 F.2d 1343, 1351 (9th Cir. 1978) (holding that "refusal to consent to a warrantless search is privileged conduct which cannot be considered as evidence of criminal wrongdoing" because, otherwise, "an unfair and impermissible burden

would be placed upon the assertion of a constitutional right"); see also *United States v. Thame*, 846 F.2d 200, 205–08 (3d Cir. 1988); *United States v. McNatt*, 931 F.2d 251, 255–58 (4th Cir. 1991); *United States v. Clariot*, 655 F.3d 550, 555 (6th Cir. 2011); *United States v. Moreno*, 233 F.3d 937, 940–41 (7th Cir. 2000). Caselaw from state and federal cases make clear that the prosecution may not use the invocation of any constitutional right against a defendant in criminal proceedings.

The Wisconsin Court of Appeals applied these same principles to the Fourth Amendment in *State v. Banks*, 2010 WI App 107, 328 Wis. 2d 766, 790 N.W.2d 526. In *Banks*, the prosecutor elicited testimony at trial that the defendant refused to voluntarily submit a DNA sample to law enforcement. *Id.* ¶ 19. The prosecutor then argued the defendant would not give a DNA sample because it would incriminate him. *Id.* The prosecutor used the fact that the defendant refused testing against him in court. The Court of Appeals found the prosecutor's actions improper; the defendant's attorney was ineffective for not objecting to such evidence, and overturned the defendant's conviction. *Id.* ¶ 25. *Banks* stands for the principle that the State, in pursuing a prosecution, may not use a defendant's refusal to submit a DNA sample – a constitutionally protected right – as evidence against them at trial.

The principle applied in *Banks* is nearly identical to the argument advanced here. If the refusal to provide a DNA sample cannot be used against a person in their criminal proceedings, then neither can a person's refusal to provide a blood sample.

The State has failed to provide a convincing argument as to why a blood sample after an arrest for OWI should be treated categorially different than any other search under the Fourth Amendment.

The State cites to *State v. Bolstad*, 124 Wis. 2d 576, 370 N.W.2d 257 (1985) and *State v. Zielke*, 137 Wis. 2d 39, 403 N.W.2d 427 (1987) for the proposition that the prosecution may use a refusal against a defendant at trial. (State's Brief, 7-8.) However, these cases pre-date *Birchfield*. The holding of these cases cannot stand in the face of the U.S. Supreme Court's holding in *Birchfield* that a person has a constitutional right to privacy in regard to their blood.

The State cites to *State v. Lemberger*, 2017 WI 39, 374 Wis. 2d 617, 893 N.W.2d 232, in an attempt to further its argument that a refusal can be used at a criminal trial. (State's Brief, 20-21). *Lemberger* involved a defendant's refusal to provide a breath test, not a blood test. Id. ¶ 41. The *Lemberger* Court clearly understood that *Birchfield* recognized a difference between a breath test and a blood test:

> With regard to constitutional rights pertaining to drunk driving, namely an individual's Fourth Amendment right to be secure against unreasonable search and seizure, a warrantless breath test and a warrantless blood test are treated differently. The instant case involves a breath test, not a blood test.
>
> The 'Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving.' *Birchfield v. North Dakota*, —— U.S. ——, 136 S.Ct. 2160, 2184, 195 L.Ed.2d 560 (2016). In contrast, as a general rule, the Fourth Amendment does not permit warrantless blood draws incident to lawful drunk driving arrests. *Birchfield*, 136 S.Ct. at 2185.

Id. ¶¶ 41-42.

Lemberger does not bolster the State's argument because it only discusses the prosecutor's use of a breath test refusal at trial. *Lemberger* does not address the constitutionality of a search of a person's blood.

B. The Informing the Accused form threatened Levanduski with criminal consequences for refusing to provide a blood sample and therefore coerced her into giving consent.

The Informing the Accused form asserts that a person's refusal to submit to a blood test can be used against them in court. As discussed above, while courts have previously upheld such use, this practice can no longer be consistent with caselaw. A person's refusal to submit to a blood test is an exercise of a constitutionally protected right and therefore cannot be used against that person in a criminal OWI trial as consciousness of guilt evidence.

The relevant part of the Informing the Accused form read to Levanduski is, "The test results or the fact that you refused testing can be used against you in court." Levanduski was arrested for a criminal OWI. She was placed in the back of a squad car. It would have been clear to any person in this situation that she was facing criminal consequences. Levanduski was then read a form that indicated her refusal to submit to a blood test could be used against her in court. While she was not told unambiguously it could be used against her in the future criminal prosecution of her OWI, this is the only logical conclusion to which a person in her position would arrive. There is no practical distinction between telling an arrested individual that

their actions can be used against them in court and telling that person their actions will carry criminal penalties. A person in that situation would think one is the same as the other.

The rules of statutory interpretation support this conclusion. The language contained in the Informing the Accused form read by law enforcement officers in this case is mandated by statute. Wis. Stat § 343.305(4) states that law enforcement "shall read the following to the person from whom the test specimen is requested." Wis. Stat. § 343.305(4). The language at issue in Levanduski's case is contained in the second paragraph and reads as follows:

> 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.*

Id. (emphasis added).

Statutory interpretation begins with the language of the statute and if that language is plain, the inquiry generally stops. *State ex rel. Kalal v. Circuit Court for Dane Cty*., 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. The language is given its common, ordinary, and accepted meaning, except that technical or specially defined words or phrases are given their technical or special definitional meaning. *Id.*

"The fact that you refused testing can be used against you in court" is clear and uses common phrases with well accepted meanings. A well-informed person

would not interpret this phrase to mean anything other than law enforcement using the fact that they refused against them in court, in the prosecution of the charge for which they had been arrested. When read in conjunction with the rest of the paragraph, this language becomes even more clear and unambiguous.

The entire paragraph containing this language relates to the potential penalties and consequences associated with taking the requested test or, alternatively, refusing it.

Language contained in a statute is to be read giving reasonable effect to every word, in order to avoid absurd or unreasonable results and surplusage. *Id.* ¶ 46. The statute informs the individual that a test that shows more alcohol than the law permits will result in a license suspension. Wis. Stat § 343.305(4). Similarly, it indicates "if you refuse to take any test… your operating privilege will be revoked and you will be subject to other penalties." *Id.* These statements reflect the administrative penalties associated with a positive test or a refusal.

To give effect and to avoid surplusage, the subsequent sentence, "the fact that you refused…" must be read to reference something other than administrative penalties referenced in the previous sentences. It must be read as a warning that the test results or a refusal can be used against you in court, in relation to the charge for which the individual was arrested.

The requirement of police to provide a person with a *Miranda* warning is enlightening as to a person's expectation of the meaning of words. In *Miranda,* the U.S. Supreme Court held that a person must be informed of their right to remain

silent or their words could be used against them in court. "The warning of the right to remain silent must be accompanied by the explanation that anything said *can and will be used against the individual in court*." *Miranda v. Arizona*, 384 U.S. 436, 469, 86 S. Ct. 1602, 1625 (1966) (emphasis added). The Court did not explicitly state that "court" meant criminal court. However, a person who is arrested for a criminal offense naturally would believe that if their statement was used against them in court, it would be in a court of criminal proceedings.

The same principle the Court applied in *Miranda* applies here. A Wisconsin motorist arrested for OWI would reasonably conclude, after being told their refusal to provide a blood sample would be used against them in court, that a refusal would be used against them in the criminal proceedings related to that OWI charge. This language is clear and unambiguous and is contrary to established caselaw and is thus not an accurate statement of the law.

The language contained in the Informing the Accused form is coercive in that it incorrectly advises a person that they could face consequences in criminal proceedings for the exercise of a constitutional right.

C. Levanduski's consent to provide a blood sample was coerced by the Informing the Accused form's threat to use a refusal to submit to a blood search against her in court.

If the State relies upon consent for a search, the consent must be voluntary. See generally *United States v. Griffin*, 530 F.2d 739, 743 (7th Cir. 1976). Only

voluntarily given consent will pass constitutional muster. *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973).

If consent is granted only in acquiescence to an unlawful assertion of authority, the consent is invalid. *State v. Munroe*, 2001 WI App 104, ¶10, 244 Wis. 2d 1, 630 N.W.2d 223 (internal citations omitted). When a law enforcement officer claims authority to conduct a search that does not exist, the situation is coercive. *Bumper v. North Carolina*, 391 U.S. 543, 550 (1968). "Where there is coercion there cannot be consent." *Id.*

When determining if consent is voluntary, a court should look to several factors, most notably whether there was a misrepresentation of the law in the dialogue between law enforcement officers and the accused. *State v. Phillips*, 218 Wis.2d 180, 198, 577 N.W.2d 794 (1998).

Here, law enforcement presented Levanduski with an incorrect statement of the law. The officer informed Levanduski that if she exercised a constitutional right, it would later be used against her later in court. She was forced to make the false choice either to refrain from exercising a constitutional right, the right to refuse consent to a blood draw, or face negative repercussions at her criminal trial. This misrepresentation of the law was coercive and thus rendered involuntary Levanduski's actual consent to a blood draw.

The situation here contains parallels to the situation the Wisconsin Supreme Court recently addressed in *State v. Blackman*, 2017 WI 77, 377 Wis. 2d 339, 898 N.W.2d 774. In *Blackman*, law enforcement read the Informing the Accused form

to the defendant after he was involved in an accident that resulted in death or great bodily harm of another. *Id.* ¶ 64. Law enforcement did not suspect him of being impaired. *Id.* ¶ 15. The form advised the defendant that refusal to provide a blood sample would result in the revocation of his license. *Id.* ¶ 64. The Court found this, as a matter of fact, was not true. *Id.*

Based on the officer's misrepresentation of the law, the Court concluded the prosecution failed to meet its burden of proving the defendant's consent was voluntarily and freely given under the Fourth Amendment. *Id.* ¶ 66. Further, it was the product of coercion, express or implied, and therefore was invalid under the Fourth Amendment. *Id.*

Although Levanduski is challenging different text in the Informing the Accused form, the arguments are identical. Law enforcement officers read the same Informing the Accused form here as they did to the defendant in *Blackman*. The text in both situations were misrepresentations of the law. In *Blackman*, the inaccurate text informed the defendant that his license would be revoked if he refused the test. This was not true. Here, the inaccurate text informed Levanduski that her refusal to submit to a blood test could be used against her at trial. For the reasons indicated above, this cannot be true. Because the text misstates the law, it is therefore coercive and any actual consent from a person who has been read this text is invalid under the Fourth Amendment.

CONCLUSION

This Court should affirm the circuit court's order granting Levanduski's motion to suppress evidence of her blood sample and all derivative evidence.

Dated this 29th day of January, 2020.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,847 words.

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____ day of January, 2020.

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