STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2019AP1144-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

DAWN J. LEVANDUSKI,

Defendant-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

REPLY BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

JEFFREY A. SISLEY
Assistant District Attorney
State Bar #1000017

Attorneys for Plaintiff-Appellant

Ozaukee County District Attorney's Office
Post Office Box 994
Port Washington, Wisconsin 53074-0994
(262) 284-8380
(262) 284-8365 (Fax)
jeff.sisley@da.wi.gov

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I. The circuit court erred in concluding that the State may not use a person's refusal as evidence in a criminal trial.

A. The circuit court's decision was not premised on the privacy interest in a person's blood.

Levanduski asserts that the circuit court's decision rests on the privacy interest in the blood in a person's body. She claims that the court found that the State cannot use a refusal against the person in court because a refusal is the exercise of a constitutional right to privacy. (Levanduski's Br. 7.)

However, the circuit court's decision did not rest on a constitutional right to privacy.

There is no dispute that a person has a right to privacy in the blood in her body. A blood draw is "an invasion of bodily integrity" that "implicates an individual's 'most personal and deep-rooted expectations of privacy.'" *Missouri v. McNeely*, 569 U.S. 141, 148 (2013) (quoting *Winston v. Lee*, 470 U.S. 753, 760 (1985)). And "any compelled intrusion into the human body implicates significant, constitutionally protected privacy interests." *Id.* at 159.

Contrary to Levanduski's assertion (Levanduski's Br. 17), a person also has a privacy interest in her breath. *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2173 (2016) (citing *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 616–17 (1989)).

Notwithstanding that privacy interest, the State may compel a breath test incident to arrest, *Id.* at 2185, and it may use a person's refusal to submit to a breath test in court. *State v. Lemberger*, 2017 WI 39, ¶¶ 19, 34, 36, 374 Wis. 2d 617, 893 N.W.2d 232.

A State may not compel a blood draw incident to arrest. *Birchfield*, 136 S. Ct. at 2185. But it may administer a blood draw pursuant to a search warrant, *McNeely*, 569 U.S. at 148 (citing *Schmerber v. California*, 384 U.S. 757, 770 (1966)), or when there are exigent circumstances, id. at 150–51 (citing *Schmerber*, 384 U.S. at 758–59, 770). If a person refuses to cooperate with a blood draw authorized by a warrant or justified by exigent circumstances, a forcible blood draw may be administered. See Wis. Stat. § 968.14 ("All necessary force may be used to execute a search warrant"); *Schmerber*, 384 U.S. at 770 (forcible blood draw reasonable where justified by exigent circumstances).

A blood draw may also be justified by consent. *McNeely*, 569 U.S. at 160–61. A State may not criminalize a refusal to take a blood test. But it may impose civil penalties (operating privilege revocation) and evidentiary consequences (use of a refusal in court). Informing Lavanduski of those permissible penalties and consequences for refusal did not render her consent involuntary.

B. The United States Supreme Court and Wisconsin Supreme Court have held that a State may use a person's refusal to submit to a lawful request for a blood sample under the implied consent law at trial.

In *South Dakota v. Neville*, the United States Supreme Court held that an implied consent law that authorized the use of a person's refusal to submit to a lawful request for a blood draw as evidence at a criminal OWI trial did not violate the Constitution. 459 U.S. 553, 559–560 & n.10, 564 (1983). In *State v. Bolstad*, the Wisconsin Supreme Court held that the same is true under Wisconsin law. 124 Wis. 2d 576, 585, 370 N.W.2d 257 (1985).

In *McNeely*, the Supreme Court held that the natural dissipation of alcohol in a person's bloodstream is not a per se exigency justifying a warrantless nonconsensual blood draw.

569 U.S. at 156. But the Court assured that its holding would not "undermine the governmental interest in preventing and prosecuting drunk-driving offenses." *Id.* at 160. The Court reasoned that "States have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence," including "implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense." Id. at 160–61. The Court noted that "[s]uch laws impose significant consequences when a motorist withdraws consent; typically the motorist's driver's license is immediately suspended or revoked, and 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. (citing *Neville*, 459 U.S. at 554, 563–64).

In *Birchfield*, the Court affirmed that in *Neville* and *McNeely* it "referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply," and that "nothing we say here should be read to cast doubt on" those laws. 136 S. Ct. 2160, 2185 (2016) (citing *McNeely*, 569 U. S. at 161; Neville, 459 U.S. at 560).

In *State v. Dalton*, the Wisconsin Supreme Court quoted *Birchfield* as acknowledging that its "prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply." 2018 WI 85, 383 Wis. 2d 147, ¶ 58, 914 N.W.2d 120 (quoting *Birchfield*, 136 S. Ct. at 2185).

Under *Birchfield* and *Dalton*, a State may impose evidentiary consequences for a refusal to submit to a lawful request for a blood sample under the implied consent law. In other words, a State may use the refusal as evidence at a

criminal trial. The circuit court erred when it held to the contrary.

C. The use of a refusal at a criminal trial is not a criminal penalty—it is a permissible evidentiary consequence.

Levanduski argues that "[t]o use a refusal to provide a blood sample as evidence of guilt at a criminal trial is not a mere evidentiary consequence," but "an end run around Birchfield's central holding that a person may not suffer criminal penalties for refusing to provide a sample of their blood." (Levanduski's Br. 18.)

But using a refusal to prove a person guilty of OWI at a criminal trial is not an "end run around *Birchfield's* central holding." It is entirely consistent with the Court's holding regarding implied consent laws. *Birchfield* distinguished between evidentiary consequences—which are permissible—and criminal penalties—which are not. It said that in *Neville* and *McNeely* it had "referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply," and that "nothing we say here should be read to cast doubt on" those laws. *Birchfield*, 136 S. Ct. at 2185 (emphasis added).

The Court said 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," and it established that limit: implied consent laws "that impose civil penalties and evidentiary consequences on motorists who refuse to comply" are constitutional, and "nothing we say here should be read to cast doubt on them." *Id.* at 2185. But laws that criminalize refusal are unconstitutional: "we conclude that motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense." *Id.* at 2186.

Levanduski argues that the use of a refusal at trial is "not merely an evidentiary consequence." (Levanduski's Br. 18.) She says, "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." (Levanduski's Br. 21.)

Levanduski does not explain what else the *Birchfield* Court could have meant by "evidentiary consequences" if it did not mean "use of refusal as evidence." After all, what is the use of the refusal as evidence if it is not an "evidentiary consequence" of a refusal?[1]

The Supreme Court's own opinions confirm that use at trial is a permissible evidentiary consequence for a refusal. In *McNeely*, the Court explained that implied consent laws are a "legal tool" that States have to fight drunk driving, and that those laws "impose significant consequences when a motorist withdraws consent; typically the motorist's driver's license is immediately suspended or revoked, and most States allow the motorist's refusal to take a BAC test to be used as evidence against him in a subsequent criminal prosecution." *McNeely*, 569 U.S. at 161 (emphasis added).[2]

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[1] Other evidentiary consequences of a refusal are also permissible. See, e.g., Wis. Stat. §§ 343.307(1)(f); 346.65(2)(am); (refusals under Wis. Stat. § 343.305(10) are counted to enhance the sentence for a subsequent OWI conviction).

[2] The Supreme Court's statement in *McNeely* was not dicta as Levanduski claims. (Levanduski's Br. 17.) The Court addressed implied consent laws in order to explain the impact of its holding that exigent circumstances do not always justify a warrantless blood draw. And *Birchfield's* discussion of its approval of implied consent laws in *McNeely* was central to its determination that an implied consent law may properly impose civil penalties and evidentiary consequences but may not criminalize refusal.

In *Birchfield*, the Court explained that "[s]uspension or revocation of the motorist's driver's license remains the standard legal consequence of refusal. In addition, evidence of the motorist's refusal is admitted as evidence of likely intoxication in a drunk-driving prosecution." *Birchfield*, 136 S. Ct. at 2169 (citing *McNeely*, 569 U.S. at 161) (emphasis added). The Court noted that its prior opinions had "referred approvingly" to "implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply." Id. at 2185 (citing *McNeely*, 569 U.S. at 161). The Court said, "nothing we say here should be read to cast doubt on" those laws. *Id.* There can be no serious question that the use of the refusal at a criminal trial for an OWI-related offense is an "evidentiary consequence" of which the Court approved.

When the Wisconsin Supreme Court in *Dalton* quoted *Birchfield* as approving civil penalties and evidentiary consequences for a refusal, the court understood that under *Birchfield*, the use of a refusal in a criminal trial was permissible. 383 Wis. 2d 147, ¶ 58 (quoting *Birchfield*, 136 S. Ct. at 2185).

Just a year earlier, Justice Ann Walsh Bradley, who authored *Dalton*, joined a dissent by Justice Abrahamson which discussed Wisconsin's implied consent law and *Birchfield*. *Milewski v. Town of Dover*, 2017 WI 79, 377 Wis. 2d 38, 899 N.W.2d 303. The dissent explained that under the implied consent law, "a driver faces the 'difficult choice' between consenting to a blood draw or refusing to consent to a blood draw and facing revocation of the driver's license and the prosecution's use of 'refusal evidence' at trial." Id. ¶ 205 (Abrahamson, J., dissenting). The dissent recognized that "the Implied Consent Law impose[s] civil consequences, not criminal consequences," for a refusal, *Id.* ¶ 206, and it declared that "[t]he Wisconsin Implied Consent Law is constitutional" under *Birchfield*. *Id.* ¶ 204 & n.44.

As the State pointed out in its opening brief (State's Br. 21–24), every state that has decided whether *Birchfield* prohibits the use of a refusal at trial has reached the same result—use of a refusal at trial is permissible so long as the State does not threaten or impose criminal penalties for refusal. Levanduski does not address any of these cases.

Levanduski instead points to cases from Idaho and Kentucky in which courts determined that a refusal cannot be used against a person in a criminal trial. (Levanduski Br. 21–22.) Neither case is persuasive. In *State v. Jeske*, 436 P.3d 683, 689–90 (Idaho 2019), the court assumed without deciding that use of a refusal at trial was impermissible, but it held that any error was harmless. *McCarthy v. Commonwealth*, No. 2017-CA-0001927-MR, 2019 WL 2479324 (Ky. Ct. App. June 14, 2019) (unpublished), is a Kentucky Court of Appeals opinion which will not be published and "may generally not be cited or used as binding precedent," because the Kentucky Supreme Court granted review. And the Kentucky Court of Appeals did not rely on *Birchfield* because it concluded that *Birchfield* did not decide whether the State may use a refusal in court. *Id.* at *5. Instead, the court concluded that a refusal may not be used as evidence under Kentucky law. *Id.* Notably, the court did not acknowledge that *Birchfield* said that a State may impose evidentiary consequences for a refusal. *Id*

D. The United States Supreme Court recently denied review of a Pennsylvania Supreme Court decision which held that use of a refusal at trial is a permissible evidentiary consequence.

Numerous cases from other States have recognized that use of a refusal at trial is permissible under *Birchfield*. (State's Br. 21–24). One of those cases, *Commonwealth v. Bell*, 211 A.3d 761 (Pa. 2019), is particularly instructive.

Bell refused a request for a blood sample under Pennsylvania's implied consent law, after being advised that a refusal "may be introduced in evidence" at a trial for driving under the influence of an intoxicant. *Bell*, 211 A.3d at 764, 770–71. The trial court suppressed the evidence of the refusal, citing *Birchfield*. *Id.* at 764. The superior court unanimously reversed. *Id.* at 765. The Pennsylvania Supreme Court granted review to determine whether the law permitting the use of a refusal as evidence at a criminal trial violates the Fourth Amendment. *Id.* at 763, 765.

The supreme court recognized that *Birchfield* "rejected criminal prosecution as a valid consequence for refusing a warrantless blood test," but that "the Court did not back away from its prior approval of other kinds of consequences for refusal, such as 'evidentiary consequences.'" *Id.* at 775. The court noted that *Birchfield* cited *Neville* and *McNeely* as approving civil penalties and evidentiary consequences for refusal, and it found "ample support to conclude the High Court would approve this particular evidentiary consequence in the context of a Fourth Amendment challenge." *Id.* at 776. The court concluded that the use of a refusal as evidence at a criminal trial is a permissible evidentiary consequence of a refusal. *Id.* at 763–64, 776.

Bell petitioned for certiorari, asserting that *Birchfield* recognized a constitutional right to refuse a warrantless blood test, and using a refusal as evidence at a criminal trial would be "an end run around *Birchfield's* holding that a State may not criminally prosecute a motorist based on his insistence that the State obtain a search warrant where the Fourth Amendment requires one." Petition for Writ of Certiorari at 12, *Bell v. Pennsylvania*, No. 19-622, 2019 WL 6115066 (U.S. Nov. 14, 2019)[3]

[3] It appears that Levanduski's brief borrows liberally from the dissent and the petition for writ certiorari in Bell.

Bell urged the Supreme Court to grant review and "make clear that States cannot bypass motorists' Fourth Amendment rights by introducing evidence of their refusal to consent to non-exigent, warrantless blood tests." *Id.* at 21. The Supreme Court declined to do so, and denied review without even ordering a response from the State of Pennsylvania.

II. There is no constitutional right to refuse a lawful request for a blood sample under Wisconsin's implied consent law.

Levanduski argues that use of a refusal in court is impermissible because it would punish a person for exercising a constitutional right. (Levanduski's Br. 23–27.)

It is true that a State may not use the exercise of a constitutional right against a person: "It has long been established that a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution." *Harman v. Forssenius*, 380 U.S. 528, 540 (1965). A State may not prohibit the exercise of a constitutional right or penalize the exercise of a constitutional right. *Dunn v. Blumstein*, 405 U.S. 330, 341 (1972).

But Levanduski has it backwards. *Birchfield* affirmed that a State may impose civil penalties and evidentiary consequences on a refusal to submit to a law enforcement officer's lawful request for a blood sample. 136 S. Ct. at 2185. Since penalties and consequences can be imposed for a refusal, there must be no constitutional right to refuse.

Levanduski argues that because the use of a refusal in court would violate the Fifth Amendment, it must violate the Fourth Amendment. (Levanduski's Br. 24–26.)

But the use of a refusal in court does not violate a person's Fifth Amendment right against self-incrimination or to due process. *Neville*, 459 U.S. at 564–566. And because "[t]he values protected by the Fourth Amendment thus

substantially overlap those of the Fifth Amendment helps to protect," *Schmerber*, 384 U.S. at 767, it follows that if the law does not criminalize refusal, then a person has no Fourth Amendment right to refuse.

III. Levanduski was properly informed of the consequences of refusing and she voluntarily consented to a blood draw.

Levanduski argues that her consent was involuntary because she was informed that a refusal to provide a blood sample could be used against her in court. (Levanduski's Br. 27–32.)

The implied consent warnings inform a person that a refusal to submit to a lawful request for a blood sample can be used against the person in court. Wis. Stat. § 343.305(4). As explained above, that information is correct. Laws, such as Wisconsin's, that impose civil penalties and evidentiary consequences for refusal are permissible; laws that criminalize a refusal to give a blood sample go too far. *Birchfield*, 136 S. Ct. at 2185–86; Dalton, 383 Wis. 2d 147, ¶ 58. The use of a refusal at a criminal trial is an evidentiary consequence, not a criminal penalty. *Birchfield*, 136 S. Ct. at 2169, 2185. Therefore, a State may lawfully inform a person that if she refuses, her refusal can be used against her as evidence at trial. Lavanduski was properly informed of the consequences of refusing, and her consent to a blood draw was voluntary.

CONCLUSION

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

Dated this 18th day of March, 2020.

Respectfully submitted,

JEFFREY A. SISLEY
Assistant District Attorney
State Bar #1000017

Attorneys for Plaintiff-
Appellant

Ozaukee County District Attorney's Office
Post Office Box 994
Port Washington, Wisconsin 53074-0994
(262) 284-8380
(262) 284-8365 (Fax)
jeff.sisley@da.wi.gov

CERTIFICATION

I hereby certify that this reply brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2994 words.

JEFFREY A. SISLEY
Assistant District Attorney

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 18th day of March, 2020.

JEFFREY A. SISLEY
Assistant District Attorney

APPENDIX OF PLAINTIFF-APPELLANT

The State will not be submitting an appendix.

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The State has not submitted an appendix.