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SUPREME COURT

STATE OF WISCONSIN
IN SUPREME COURT

CASE NO. 2019AP001144 - CR

STATE OF WISCONSIN,

Petitioner-Appellant,

v.

DAWN J. LEVANDUSKI,

Defendant-Respondent.

PETITION FOR REVIEW

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ISSUE PRESENTED FOR REVIEW

1. Whether the Defendant-Respondent Dawn J. Levanduski has a constitutional right to refuse an evidentiary blood draw under the Fourth Amendment of the US Constitution, thereby making the warning contained in the Informing the Accused form false and coercive and thus the consent to the blood draw involuntary which warned her after she was arrested for OWI Second Offense and prior to requesting an evidentiary blood draw pursuant to the arrest that if she were to refuse the voluntary blood draw her refusal can be used against her in an underlying trial of the OWI Second Offense as evidence of consciousness of guilt?

In a three judge appellate decision which is recommended for publication, the District II Court of Appeals reversed the circuit court's order granting Levanduski's motion to suppress blood test evidence based upon involuntary consent to blood draw. *State v. Levanduski*, No. 2019AP1144-CR, ¶ 1 (Wis. Ct. App. July 1, 2020); (P-Ap. 2). The court of appeals disagreed with the circuit court and held that the State is allowed to use evidence of a defendant's refusal to a voluntary blood draw as evidence of consciousness of guilt at the underlying trial on the OWI Second Offense. *Id.*

STATEMENT OF CRITERIA SUPPORTING REVIEW

The issue presented in this petition raises a real and significant issue of federal and state constitutional law. The issue of whether a defendant has a constitutional right to refuse a voluntary blood draw under the Fourth Amendment of the US Constitution such that the State cannot use the defendant's refusal against the defendant at the underlying OWI criminal trial as consciousness of guilt is both real and significant as this issue involves the right to privacy against intrusions into the human body by the government embedded in the Fourth Amendment.

This petition for review demonstrates a need for the Supreme Court to change a policy within its authority. The Supreme Court has the power to change the warnings given to drivers across the state of Wisconsin when they are warned about the consequences of refusing a voluntary blood draw pursuant to an OWI arrest to ensure the warnings given to such arrestees are not violative of the arrestees' constitutional rights.

A decision by this Supreme Court will help to clarify the law and this case calls for the application of a new doctrine of law. Since the establishment of implied consent laws in Wisconsin, courts have allowed the State to use consciousness of guilt evidence against defendants for refusing voluntary blood draws pursuant to OWI arrests but the case law was mostly developed under Fifth Amendment challenges to the issue. After the recent development of case law regarding human privacy rights against intrusions to the human body by the government as protected under the Fourth Amendment by both the US and WI Supreme Courts, the protections against blood draws have become stronger and more defined and this issue is an extension of this evolving area of jurisprudence and needs clarity.

The court of appeals decision is in conflict with the WI Supreme Court decision in *State v. Dalton*, 2018 WI 85, 383 Wis.2d 147, 914 N.W.2d 120 (2018) regarding whether a person has the constitutional right under the Fourth Amendment of the US Constitution to refuse a voluntary blood draw pursuant to an OWI arrest.

STATEMENT OF THE CASE

This petition arises from an appeal brought by the State which reversed the circuit court in Ozaukee County which granted Levanduski's motion to suppress evidence derived from involuntary consent to blood draw in her OWI Second Offense case. (P-Ap. 2). The State brought its timely appeal to the decision on the motion which was adverse to the State and the

court of appeals decided to reverse the circuit court's order granting the defendant's motion. *Id.*

Levanduski filed and successfully argued a motion to suppress evidence derived from involuntary consent to blood draw in her OWI Second Offense case in the Ozaukee County circuit court before Judge Timothy Van Akkeren. (R. 13: 1-2). The motion alleged that a warning contained in the Informing the Accused form, which is a form with uniform language which officers are required to read verbatim to every arrestee when requesting an evidentiary blood draw, was false and coercive and thus by default rendered the accused suspect's consent to the blood draw involuntary. (R. 10: 1-5). The warnings contained in the Informing the Accused form are a recitation of the language contained in Wis. Stat. 343.305(4). Thus, the motion essentially alleges that a warning contained in Wis. Stat. 343.305(4) is false and unconstitutional when given to an OWI arrestee pursuant to a request for a voluntary evidentiary blood draw. *Id.*

The specific warning alleged to be unconstitutional in Levanduski's suppression motion is the warning which warns the accused prior to a request for an evidentiary blood draw pursuant to an OWI arrest that if the accused refuses giving voluntary consent to a blood draw for OWI that the State has the right to use the refusal against that person as consciousness of guilt evidence in the underlying OWI trial. (R. 10: 2). Levanduski argued that the Supreme Court of Wisconsin articulated in *State v. Dalton*, 2018 WI 85, 383 Wis.2d 147, 914 N.W.2d 120 (2018) that a person has a constitutional right under the Fourth Amendment of the US Constitution to refuse a voluntary request for a blood draw and thus the State cannot lawfully use a defendant's refusal to consent to a blood draw as consciousness of guilt evidence at the underlying OWI criminal trial. *Id.* The opinion in *Dalton* implicated the aforementioned warning in Wis. Stat. 343.305(4) by articulating that a defendant has a constitutional right to refuse to submit to a voluntary blood draw under the Fourth Amendment. *State v. Dalton*, 383

Wis.2d 147, 173 (2018). The circuit court agreed with Levanduski that if a person has a constitutional right to refuse a blood draw under the Fourth Amendment then it follows that an officer's warning to a suspect arrested for OWI that the suspect's refusal to submit to a voluntary blood draw will be used against them at the underlying criminal OWI trial as consciousness of guilt evidence is false and coercive and renders the suspect's consent to the blood draw involuntary. (R.22: 8-9). The court of appeals reversed this decision of the Ozaukee County circuit court. *State v. Levanduski*, No. 2019AP1144-CR, ¶ 1 (Wis. Ct. App. July 1, 2020); (P-Ap. 2). The court of appeals held that warning a suspect accused of OWI that if they refuse voluntary consent to a blood draw pursuant to a criminal OWI arrest that the refusal can be used against the person as evidence of consciousness of guilt does not misrepresent the law because the majority opinion in *Dalton* recognized that the US Supreme Court in recent jurisprudence in the context of the Fourth Amendment right to privacy and blood draws in OWI cases has reiterated that despite the fact that a defendant may not be criminally penalized for refusing a blood draw under the Fourth Amendment, that civil penalties and evidentiary consequences for refusing a blood draw remain permissible. *Id.* at ¶ 13. (P-Ap. 10).

STATEMENT OF THE FACTS

The decision of the court of appeals provides a sufficient recitation of the facts relative to the issue to be reviewed here.

ARGUMENT

I. Review of Whether the State can use Consciousness of Guilt Evidence Against a Defendant at the Underlying Criminal OWI Trial for Refusing a Voluntary Blood Draw Pursuant to a Criminal OWI Arrest is Appropriate to Clarify the Defendant's Constitutional Right to Refuse a Blood Draw

In *State v. Dalton*, 2018 WI 85, 383 Wis.2d 147, 914 N.W.2d 120 (2018), the Supreme Court of Wisconsin litigated the issue of whether a circuit court is allowed to enhance a jail sentence in an OWI sentencing due to the fact that the defendant refused a voluntary blood draw, and the Supreme Court held that a circuit court cannot legally enhance a jail sentence in a criminal OWI case because this violates a defendant's constitutional right to refuse a voluntary blood draw. *Id.* at 173. Because the *Dalton* court elevated the right to refuse a blood draw to constitutional dimensions, there is a need for this Court to grant review to clarify the limits of the constitutional right to refuse a blood draw and this case presents this issue.

There is a need to change statewide policy embedded in the issue in this case. Wisconsin drivers suspected and arrested for OWI are required to be read by law enforcement a form called the Informing the Accused form prior to the officer requesting an evidentiary chemical test to test the arrestee's blood for BAC evidence. (See Wis. Stat. § 343.304(4)). The form is a recitation of Wis. Stat. 343.305(4), which is a series of warnings to the arrestee of the consequences which will be doled out to the arrestee if he refuses the chemical test or if he consents to the chemical test. The key piece of the statute at issue in this case which this petition presents is the warning from the statute that if the arrestee refuses to consent voluntarily to an evidentiary blood draw that the arrestee will be subjected to having the refusal to the voluntary blood draw be used against them as consciousness of guilt evidence at the underlying OWI trial. Levanduski contends in this petition that this warning is a violation of the constitutional principles announced by the Supreme Court in the *Dalton* decision, because if a person has a constitutional right to refuse a blood draw that person should be allowed to exercise that

constitutional right without the fear of it being used against them as evidence of guilt in a subsequent OWI criminal trial. Additionally, it should be noted that the penalty for any criminal OWI offense in the State of Wisconsin is mandatory jail time. (See Wis. Stat. § 346.65(2)) There is not one criminal OWI offense in the State of Wisconsin where a defendant will not be subjected to the confines of a jail if they are found guilty, as the Wisconsin legislature has curbed prosecutorial discretion and judicial discretion when it comes to sentencing offenders by requiring mandatory minimum jail sentences in every criminal OWI offense in the State of Wisconsin. (See Wis. Stat. § 346.65(2)). In this case, if Levanduski is found guilty of the underlying OWI Second Offense, she is guaranteed to spend a minimum of five days in jail. (See Wis. Stat. § 346.65(2)(am)2) This makes this issue of the right to refuse a blood draw and whether the State can use the evidence of refusal at the underlying OWI criminal trial unique to the State of Wisconsin and makes the need for review of this issue paramount.

The circuit court in this case agreed with Levanduski that the warning given prior to the blood draw was false and coercive and invalidated the voluntariness of her consent to the blood draw, but the court of appeals reversed this decision by rationalizing that using evidence of consciousness of guilt for refusing a voluntary blood draw at the underlying OWI trial is not a 'criminal penalty' but is rather an 'evidentiary consequence' which does not violate the principles of the *Dalton* decision. *State v. Levanduski*, No. 2019AP1144-CR, ¶ 14 (Wis. Ct. App. July 1, 2020); (P-Ap 10). This is erroneous by the court of appeals and requires review by this Court. The *Dalton* decision does indicate that case law regarding refusal of blood draws has indicated approval for civil penalties and evidentiary consequences on motorists who refuse to comply. *Dalton*, 383 Wis.2d 147, 172 (2018). But the *Dalton* decision also elevated a person's right to refuse a blood draw to a constitutional right under the Fourth Amendment as a right to privacy against intrusions to the human body by the government. *Id.* 173. The *Dalton* court rationalized that to increase a sentence because a person refuses a blood draw is the equivalent to a court increasing a sentence because the person exercised the right to a jury trial, the right to remain silent, or a search of his home. *Id.* at 175.

Therefore, this case presents a conflict within the rationale of *Dalton* that this Court should review, as a circuit court should not be allowed to introduce a defendant's refusal to submit to a voluntary blood draw as consciousness of guilt evidence if the defendant has a constitutional right to refuse a blood draw yet *Dalton* doesn't answer this issue directly and this important issue should not be left settled by the court of appeals decision in this case.

This review calls for the application of a new doctrine of law. The history of the case law regarding this issue has been consistent in allowing the State to use evidence of consciousness of guilt for refusing a voluntary blood draw against a defendant and the court of appeals decision in this case gives the recitation of the history of landmark decisions regarding this issue demonstrating this. *State v. Levanduski*, No. 2019AP1144-CR, ¶ 7 - ¶ 9 (Wis. Ct. App. July 1, 2020); (P-Ap. 4-6). These decisions all predate *Dalton.* The *Dalton* court by elevating the right to refuse a blood draw as a constitutional right under the Fourth Amendment creates a need for this Court to review this issue and create a new doctrine of law consistent with the principles announced by the majority of the Supreme Court in *Dalton.*

CONCLUSION

For the aforementioned reasons, this Court should grant review of the issue presented.

Dated at Milwaukee, Wisconsin on July 30, 2020.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a petition produced with a proportional serif font. The length of this brief is **1,050** words.

I further certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Section 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.

Respectfully submitted this 30th day of July, 2020.

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19 (2) (a) and that contains: (1) a table of contents; (2) the findings or opinions of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues. I further certify that this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the finding of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Respectfully submitted this 30th day of July, 2020

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