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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2019AP001850

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SCOTT W. FORRETT,

Defendant-Appellant.

On Notice of Appeal from a Judgment of Conviction the Honorable Michael Aprahamian Presiding, and an Order Denying a Postconviction Motion, the Honorable Brad Schimel Presiding, Entered in Waukesha County

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

KAITLIN A. LAMB
Assistant State Public Defender
State Bar No. 1085026

Office of the State Public Defender
735 N. Water Street - Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
lambk@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

OTHER AUTHORITIES CITED

ISSUE PRESENTED

Is Wisconsin's statutory scheme permitting the use of a prior refusal to increase the criminal penalty in an operating while intoxicated case unconstitutional?

The circuit court answered no.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Counsel is not aware of any published cases addressing this issue. Consequently, publication is warranted as this case involves an issue of first impression.

While undersigned counsel anticipates that the parties' briefs will sufficiently address the issues raised, the opportunity to present oral argument is welcomed if this Court would find it helpful.

STATEMENT OF THE CASE AND FACTS

A police officer stopped Mr. Forrett's van for weaving, crossing over the fog line, and crossing over the center line. (2:3).[1] Mr. Forrett initially refused to

[1] Mr. Forrett's driving was first brought to the attention of law enforcement by a civilian driver. (2:3; 71:15).

disclose his identity. (*Id.*). Subsequently, based on the officer's observations, Mr. Forrett was arrested for operating while intoxicated (OWI). (2:4). Marijuana and a marijuana pipe were found in his pocket. (*Id.*).

Mr. Forrett was charged with six counts: (1) OWI 7th offense, contrary to Wis. Stat. § 346.63(1)(a); (2) failure to install ignition interlock device, contrary to Wis. Stat. § 347.413(1); (3) operating a motor vehicle while revoked, contrary to Wis. Stat. § 343.44(1)(b); (4) possession of THC, contrary to Wis. Stat. § 961.41(3g)(e); (5) possession of drug paraphernalia, contrary to Wis. Stat. § 961.573(1); and (6) operating with a prohibited alcohol concentration of .266, contrary to Wis. Stat. § 346.63(1)(b). (2; 7).[2]

On January 29, 2018, Mr. Forrett entered a guilty plea to OWI 7th offense. The remaining four counts were dismissed and read-in. (71:2). The operating with a prohibited alcohol concentration was dismissed as a matter of law. (27).[3]

During the plea colloquy, the following exchange occurred:

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[2] Unless otherwise indicated, all of the statutes in this brief refer to the statutes in place at the time of this incident, April 26, 2017.

[3] There was also a refusal in this case, which the Court dismissed. (71:15, 32-33).

> THE COURT: And you were previously convicted of OWI related offenses on January 22 of 1992, February 22 of 1993, August 29 of 1994, March 14 of 1995, August 26 of 1996, and March 24 of 2014?
>
> DEFENSE COUNSEL: Judge, August 26, 1996 was a refusal, there wasn't an OWI conviction but it still counts as a prior.[4]
>
> THE COURT: All right. And with that correction is that all true?
>
> MR. FORRETT: Yes, Your Honor.

(71:14; *see also* 71:22 (stating that the 5th offense was a refusal)).

On the same date, sentencing took place, the Honorable Michael J. Aprahamian presiding. Pursuant to the plea agreement, the State recommended substantial prison. (71:14-16). The defense recommended 8 years of prison (4 years of initial confinement and 4 years of extended supervision). (71:22). The Court sentenced Mr. Forrett to 11 years of prison (6 years of initial

[4] On July 27, 1996, Mr. Forrett refused to submit to a blood draw. (*See* 53 (Criminal Complaint for Waukesha Co. Case No. 96-CF-504)). The OWI 5th charge that arose out of this incident was dismissed and read-in. (*See* 52 (Judgment of Conviction for Waukesha Co. Case No. 96-CF-504)).

confinement and 5 years of extended supervision) without early release programming. (71:31-32; 11).

A postconviction motion was filed arguing that the Wisconsin statutes allowing the use of Mr. Forrett's 1996 refusal for the purposes of penalty enhancement was unconstitutional facially and as applied. (51:5). The motion also alleged that trial counsel was ineffective for failing to object to Wisconsin's unconstitutional penalty scheme and the use of Mr. Forrett's prior refusal. (51:6).

A hearing was held. (62). The State primarily argued that "an increasing penalty structure is not a criminal penalty for the refusal itself" and that trial counsel could not be ineffective for raising a novel issue. (62:6-8).

The Honorable Brad Schimel denied relief. (62; 58; App. 101-113, 114). The Court concluded that:

> Well, the defendant has a high burden to meet to have a court declare a statutory scheme unconstitutional. There is no prior appellate law that concludes that the way Wisconsin has structured this, and I believe many, if not most other states do as well, that implied consent violations can be counted as a prior. It is not the same as what the Court's addressed in *Birchfield* and *Dalton*, and this is distinct from that because in *Birchfield* and *Dalton*, the courts are addressing a court increasing the penalty in a particular case because of a defendant exercising a constitutional right, and the courts concluded

> that that's -- even though we had been doing that for a long time, they concluded that's not proper.
>
> You can't directly punish a person for refusing to provide a sample. This is different than that because the defendant had notice of the status of our laws before he drove under the influence of intoxicants again here.
>
> He knew those things could be counted, or he should have known that implied consent violations could be counted. So this doesn't punish him for directly exercising some constitutional right, rather, it simply changes the -- it affects the penalty structure relative to his conduct based on that.
>
> I don't -- that isn't the same. And, therefore, I will decline to declare Wisconsin's sentencing structure unconstitutional and will deny the defense motion on the merits.
>
> So I think then that does not put us in a position that we have to address the ineffective assistance of counsel. . .

(62:10-11; App. 110-11).

Additional relevant facts will be referenced below.

ARGUMENT

I. Wisconsin's statutory scheme permitting the use of a prior refusal to increase the criminal penalty in an operating while intoxicated case is unconstitutional.

A. Introduction.

Chapter 346 of the Wisconsin Statutes provides "rules of the road." Wis. Stat. § 346.63(1) states that no person may drive or operate a motor vehicle while under the influence of an intoxicant (OWI).

When an individual commits an OWI violation, Wis. Stat. § 346.65(2) provides a framework of escalating penalties. For example, if a person has 6 prior offenses, that person is guilty of a Class G felony and faces a maximum of 10 years of prison and a $25,000 fine and a minimum of 6 months in jail[5] and a fine of $600. *See* Wis. Stat. § 346.63(2)(am)(5). In comparison, a person who has 7 prior offenses is guilty of a Class F felony and faces a maximum of 12.5 years of prison and a $25,000 fine and a minimum of 3 years of initial confinement. *See* Wis. Stat. § 346.63(2)(am)(6).

A statute in a different chapter, Wisconsin Chapter 343, provides guidance as to what qualifies as a prior offense for the purposes of the OWI penalty

[5] This was recently increased to 1 year and 6 months. *See* 2019 Wisconsin Act 106.

structure. Pertinent to this case, Wis. Stat. §§ 343.307(1)(f) and Wis. Stat. § 343.305(10) reflect that a refusal to submit to a blood test qualifies as a prior offense.

As discussed below, the use of a prior refusal to increase an OWI penalty is unconstitutional facially and as applied to Mr. Forrett.[6]

[6] A party may challenge a statute as being unconstitutional on its face. *State v. Wood*, 2010 WI 17, ¶ 13, 323 Wis. 2d 321, 780 N.W.2d 63. "Under such a challenge, the challenger must show that the law cannot be enforced 'under any circumstances.'" *Id.* (citation omitted). In contrast, in an as-applied challenge, the challenger must show that his or her constitutional rights were actually violated. *Id.* This case is properly analyzed as a facial challenge to Wisconsin's statutory scheme. *Cf. Winnebago Cnty. v. C.S.*, 2020 WI 33, ¶¶ 3-5, 391 Wis. 2d 35, 940 N.W.2d 875 (concluding that Wisconsin's medication statute is facially unconstitutional for any prisoner inmate involuntarily committed under Chapter 51). However, the distinction between a facial challenge and an as-applied challenge is not always clear. *See League of Women Voters of Wisconsin Educ. Network, Inc. v. Walker*, 2014 WI 97, ¶ 134 n. 40, 357 Wis. 2d 360, 851 N.W.2d 302 (Shirley Abrahamson, C.J., dissenting). As a result, Mr. Forrett also includes an as-applied challenge.

B. Standard of review.

Whether Wisconsin's OWI penalty scheme is unconstitutional facially or as applied presents a question of law that is reviewed *de novo*. *Winnebago Cnty. v. C.S.*, 2020 WI 33, ¶ 13, 391 Wis. 2d 35, 940 N.W.2d 875.

Under current Wisconsin law, statutes are presumed constitutional. *State v. Cole*, 2003 WI 112, ¶ 11, 264 Wis. 2d 520, 665 N.W.2d 328. The party challenging the statute must "prove that the statute is unconstitutional beyond a reasonable doubt." *Id.*[7]

[7] The reasonable doubt standard has been called into question. In *Mayo v. Wisconsin Injured Patients*, Justice Rebecca Bradley, writing for the concurrence, criticized the three-justice majority's application of the "beyond a reasonable doubt" standard. 2018 WI 78, ¶¶ 68-97, 383 Wis. 2d 1, 914 N.W.2d 678 (R. Bradley, J., concurring). In a detailed examination of the standard, Justice Bradley explained that the "beyond a reasonable doubt" standard is "unworkable," "places courts in an absurd position," and should be replaced with a lower standard. *See, e.g., id.* ¶¶ 82, 84, 90.

Mr. Forrett acknowledges that the "beyond a reasonable doubt" standard continues to be the applicable law. *See Porter v. State*, 2018 WI 79, ¶ 57, 382 Wis. 2d 697, 913 N.W.2d 842 (R. Bradley, J., dissenting). Additionally, Mr. Forrett acknowledges that this Court cannot overrule, modify, or withdraw language from previously published opinions. *See generally, Cook v. Cook*, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). However, Mr. Forrett respectfully asserts that the "beyond a reasonable doubt" standard should be replaced with a lower standard in order to preserve a challenge for Wisconsin Supreme Court review.

C. Wisconsin's statutory scheme permitting the use of a prior refusal to increase the penalty in an operating while intoxicated case is unconstitutional.

The Fourth Amendment to the United States Constitution and Article I, section 11 of the Wisconsin Constitution protect against unreasonable searches and seizures. *State v. Eason*, 2001 WI 98, ¶ 16, 245 Wis. 2d 206, 629 N.W.2d 625.

In *North Dakota v. Birchfield*, 136 S. Ct. 2160, 2166-67 (2016), the United States Supreme Court examined whether a law making "it a crime for a motorist to refuse to be tested after being lawfully arrested for driving while impaired" violated the Fourth Amendment's proscription against unreasonable searches and seizures. The Court found "that motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense." *Id.* at 2186.

Birchfield acknowledged that "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." *Id.* at 2185 (emphasis added). However, *Birchfield* emphasized that *criminal penalties* may *not* be imposed for a refusal. The Court stated that "it is another matter . . . for a State to not only insist upon an intrusive blood test, but also to impose criminal penalties on the refusal to submit to such a test." *Id.* at 2185. "There 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.* Thus, *Birchfield* dictates that criminal penalties may not be imposed for the refusal to submit to a blood test. *State v. Dalton,* 2018 WI 85, ¶ 59, 383 Wis. 2d 147, 914 N.W.2d 120.

Contrary to the postconviction court's finding, Wisconsin's OWI penalty statutes do exactly what *Birchfield* prohibits—they allow the imposition of criminal penalties for the refusal to submit to a blood test.

In Wisconsin, a person's refusal to submit to a blood test counts as a prior offense for the purpose of increasing or lengthening the person's sentence. *See* Wis. Stat. §§ 346.63(1), 346.65(2)(am), 343.307(1)(f), & Wis. Stat. § 343.305(10). A lengthier sentence is a criminal penalty. *See State v. Dalton*, 2018 WI 85, ¶ 59 (citing *Doering v. WEA Ins. Grp.*, 193 Wis. 2d 118, 141, 532 N.W.2d 432 (1995) (referring to imprisonment as a criminal penalty); *State v. Peterson*, 104 Wis. 2d 616, 621, 312 N.W.2d 784 (1981) (same)). Thus, Wisconsin statutes criminally punish individuals for exercising a constitutional right (the refusal to take a blood test without a warrant) in violation of the United States and Wisconsin constitutions. U.S. Const. Amends. 4, 5, 14; Wis. Const. Art. 1, § 1.

A prosecutor may not penalize a defendant in a criminal case for exercising a protected right. *United States v. Goodwin*, 457 U.S. 368, 372 (1982) ("For

while an individual certainly may be penalized for violating the law, he just as certainly may not be punished for exercising a protected statutory or constitutional right."); *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) (due process violation to punish person for doing what the "law plainly allows").

And, in the case of Mr. Forrett, the exercise of his right to refuse was in fact used to punish him. The refusal increased his sentence from an OWI 6th offense, a Class G felony, to an OWI 7th offense, a Class F felony, with higher maximum and minimum penalties. *See* Wis. Stat. § 939.50(3).

Therefore, the Wisconsin OWI statutes that allow a refusal to count as a prior offense to increase a person's sentence are unconstitutional facially and as applied to Mr. Forrett. Accordingly, this Court should reverse and remand this case for the circuit court to commute Mr. Forrett's OWI 7th to an OWI 6th and either hold a new sentencing hearing or impose the maximum sentence authorized for an OWI 6th: 10 years of prison broken down as 5 years of initial confinement and 5 years of extended supervision.[8]

[8] The remedy is not clear. Given that the circuit court sentenced Mr. Forrett under the inaccurate belief that this was an OWI 7th, the circuit court arguably made an error affecting the entire sentence structure requiring a new sentencing hearing. *See generally, State v. Travis,* 2013 WI 38, 347 Wis. 2d 147, 832 N.W.2d 491 (stating that a defendant has a constitutional due process right to be sentenced upon accurate

Continued.

D. Trial counsel was ineffective for failing to object to Wisconsin's unconstitutional penalty scheme and the use of a prior refusal.

As stated above, it is Mr. Forrett's position that this case presents a facial constitutional challenge. A facial challenge to the constitutionality of a statute goes to subject matter jurisdiction and cannot be waived. *Winnebago Cnty. v. Christopher S.*, 2016 WI 1, ¶ 4 n.6, 366 Wis. 2d 1, 878 N.W.2d 109.

However, if this Court finds waiver or forfeiture, Mr. Forrett alternatively alleges ineffective assistance of counsel and requests an evidentiary *Machner* hearing.

An accused's right to the effective assistance of counsel derives from the Sixth and Fourteenth

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information and remanding for a new sentencing hearing because the circuit court erroneously believed that the defendant was subject to a mandatory minimum period of confinement); *State v. Volk*, 2002 WI App 274, 258 Wis. 2d 584, 654 N.W.2d 24 (remanding for a new sentencing hearing because the circuit court erroneously applied part of a penalty enhancer to the defendant's extended supervision affecting the entire sentencing structure). However, Mr. Forrett's sentence could also be commuted. *See* Wis. Stat. § 973.13; *State v. Spaeth*, 206 Wis. 2d 135, 556 N.W.2d 728 (1996) (commuting defendant's sentence when the State failed to prove that the defendant was a five-time offender of the operating after revocation statute).

Amendments to the United States Constitution, and Article I, section 7 of the Wisconsin Constitution. *State v. Smith*, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997). In assessing whether counsel's performance satisfied this constitutional standard, Wisconsin applies the two-part test outlined in *Strickland v. Washington*, 466 U.S. 668 (1984). *Smith*, 207 Wis. 2d at 273. To establish a deprivation of effective representation, a defendant must demonstrate that: (1) counsel's performance was deficient and (2) counsel's errors or omissions prejudiced the defendant. *Id.*

To prove deficient performance, the defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* (citations omitted). The prejudice prong requires a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Smith*, 207 Wis. 2d at 276 (citing *Strickland*, 466 U.S. at 694). The defendant need only demonstrate to the court that the outcome is suspect, but need not establish that the final result of the proceeding would have been different. *Smith*, 207 Wis. 2d at 275.

An ineffective assistance of counsel claim presents a mixed question of fact and law. *State v. Thiel*, 2003 WI 111, ¶ 21, 264 Wis. 2d 571, 665 N.W.2d 305. A circuit court's findings of fact are

upheld unless clearly erroneous. *Id.* Whether counsel was ineffective is a question of law that is reviewed *de novo. Id.*

In this case, trial counsel performed deficiently by failing to apply the relevant law and object to the use of the refusal as a prior offense and Wisconsin's unconstitutional penalty scheme. At the time of plea in this case, *Birchfield*, 136 S. Ct. 2160, had been in existence for approximately one-and-a-half years. There can be no reasonable strategic reason for failing to object to the use of the prior refusal and Wisconsin's statutory scheme. *See generally*, *State v. Wideman*, 206 Wis. 2d 91, 108, 556 N.W.2d 737 (1996) ("Defense counsel should be prepared at sentencing to put the State to its proof when the state's allegations are incorrect or defense counsel cannot verify the existence of the prior offenses."). Without the refusal, Mr. Forrett would have been convicted of an OWI 6th with a lower maximum penalty. The maximum penalty Mr. Forrett could have received would have been 10 years of prison (5 years of initial confinement and 5 years of extended supervision).

Counsel's failure prejudiced Mr. Forrett. The Court sentenced Mr. Forrett to 11 years of prison (6 years of initial confinement and 5 years of extended supervision). (71:31-32; 11). This exceeds the maximum initial confinement time for an OWI 6th.

Therefore, if this Court deems the above argument forfeited, Mr. Forrett respectfully requests a remand for an evidentiary *Machner* hearing.

CONCLUSION

For the reasons stated above, Mr. Forrett respectfully requests that this Court reverse and remand for the circuit court to commute his OWI 7th to an OWI 6th and grant a new sentencing hearing or impose the maximum sentence authorized for an OWI 6th—10 years of prison broken down as 5 years of initial confinement and 5 years of extended supervision. Alternatively, if necessary, this Court should remand for an evidentiary hearing on his ineffective assistance claim.

Dated this 7th day of July, 2020.

Respectfully submitted,

KAITLIN A. LAMB
Assistant State Public Defender
State Bar No. 1085026

Office of the State Public Defender
735 N. Water Street - Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
lambk@opd.wi.gov

Attorney for Defendant-Appellant

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 3,143 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 7th day of July, 2020.

Signed:

KAITLIN A. LAMB
Assistant State Public Defender

CERTIFICATION AS TO APPENDIX

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, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings 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 one or more initials or other appropriate pseudonym or designation 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.

Dated this 7th day of July, 2020.

Signed:

KAITLIN A. LAMB
Assistant State Public Defender

APPENDIX

INDEX
TO
APPENDIX