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**COURT OF APPEALS**

STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT II  
Case No. 2019AP001850

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SCOTT W. FORRETT,

Defendant-Appellant.

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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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REPLY BRIEF

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

In *North Dakota v. Birchfield*, 136 S. Ct. 2160 (2016), the United States Supreme Court “dictat[ed] 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.

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. 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.

The State argues that “[w]hen a refusal is used to enhance the sentence for a subsequent OWI, the sentence is imposed for the OWI, not the refusal.” (State’s Br. at 14).

Mr. Forrett disagrees with this characterization. Take for example this case. Because the refusal counts as a prior conviction under

Wisconsin's statutory scheme, Mr. Forrett went from being sentenced for a Class G felony to a Class F felony, with higher maximum and minimum penalties.

The State also argues that the issue in this case is akin to that in *State v. Levanduski*, 2020 WI App 53, 393 Wis. 2d 674, 948 N.W.2d 411 (petition for review pending), which held that a refusal could be used at trial as evidence of operating while intoxicated (OWI).

Using a refusal as evidence to help persuade a fact finder that a person is guilty of an OWI is different than using a refusal as proof of guilt to increase a person's sentence. While a refusal may be used to support guilt, it does not mean that a person is in fact guilty beyond a reasonable doubt of an OWI. A person could refuse and then be found not guilty at trial. Thus, using a refusal as evidence at trial is simply not "the same thing" as using a refusal to increase a sentence. By using a refusal to increase a sentence, the person is suffering a criminal penalty for the refusal.

Lastly, holding that a refusal cannot be used to increase a sentence will not allow people to "escape convictions" as the State suggests. (State's Br. at 15-16). As discussed above, under current case law, a refusal can be used as evidence at trial to convict a person of an OWI. See *Levanduski*, 2020 WI App 53. Additionally, the person can be subject to civil penalties. *Id.* ¶ 12.

Therefore, this Court should find that the Wisconsin OWI statutes that allow a refusal to count as a prior offense are unconstitutional.

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

As stated in the initial brief, it is Mr. Forrett's position that this case presents a facial challenge. (Forrett Br. at 7).<sup>1</sup> A facial challenge cannot be waived. *Winnebago Cnty. v. Christopher S.*, 2016 WI 1, ¶ 4 n.6, 366 Wis. 2d 1, 878 N.W.2d 109. Thus, this Court need not reach the ineffective assistance of counsel claim.

However, if this Court finds waiver or forfeiture, Mr. Forrett asks that this Court address the ineffective assistance of counsel claim.

Mr. Forrett agrees with the State that if the constitutional challenge lacks merit, he cannot prevail on a claim of ineffective assistance of counsel.

If, however, the constitutional claim is meritorious and this Court finds waiver or forfeiture, Mr. Forrett was deprived of effective assistance of counsel. A reasonable attorney would have reviewed

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<sup>1</sup> It does not appear that the State contests this characterization. (See State's Br. at 7).

*Birchfield*<sup>2</sup> and objected in this case. Counsel is expected to research and interpret relevant portions of the law. *See State v. Thiel*, 2003 WI 111, ¶ 51, 264 Wis. 2d 571, 665 N.W.2d 305; *see also* SCR 20:1.1 (“A lawyer shall provide reasonably competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”).

The State cites *State v. Lemberger*, 2017 WI 39, 374 Wis. 2d 617, 893 N.W.2d 232, for the proposition that trial counsel cannot perform deficiently by failing to make a novel argument. However, in *Lemberger*, there was “settled” case law and the defendant asked that several cases be “overruled and no longer followed.” *Id.* ¶¶ 19, 30, 36. That is not the situation here. The State has not cited any published Wisconsin decision stating that it is proper to use a refusal to enhance an OWI conviction following *Birchfield*.

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<sup>2</sup> Contrary to the State’s suggestion, Mr. Forrett has always based his ineffective assistance of counsel claim on *Birchfield*, not *Dalton*, which was decided after the plea. (*See* Forrett Br. at 14).

## 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 16th day of November, 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 903 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 the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that a copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

Dated this 16<sup>th</sup> day of November, 2020.

Signed:

*Electronically signed by Kaitlin A. Lamb*  
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