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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2019AP1850-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

SCOTT W. FORRETT,

Defendant-Appellant.

ON APPEAL FROM A DECISION OF THE COURT OF APPEALS REVERSING A JUDGMENT OF CONVICTION AND AN ORDER DENYING A MOTION FOR POSTCONVICTION RELIEF, ENTERED IN THE WAUKESHA COUNTY CIRCUIT COURT, THE HONORABLE MICHAEL J. APRAHAMIAN AND THE HONORABLE BRAD SCHIMEL, PRESIDING

REPLY BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER

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INTRODUCTION

The court of appeals erred in finding Wisconsin's accelerated OWI penalty structure unconstitutional. Wisconsin law does not make it a crime to refuse to submit to a lawful request for a blood sample. It authorizes only constitutionally permissible civil penalties and evidentiary consequences for a refusal, including revocation of the person's operating privilege. The use of a revocation to enhance the criminal sentence for a separate subsequent OWI is permissible because the increased sentence is for the subsequent offense, not punishment for the prior refusal.

Forrett argues that Wisconsin's accelerated OWI penalty structure is unconstitutional because (1) a person has a constitutional right to refuse a warrantless blood draw and cannot be penalized for exercising that right; and (2) using a prior offense to increase the punishment for a separate subsequent OWI conviction criminally punishes the prior refusal. Both of these propositions are wrong.

A person has a constitutional right to be free from an unreasonable search, and revocation of a person's operating privilege because he improperly refused to submit to a lawful request for a blood test does not violate that right. Using a prior revocation for improperly refusing to increase the sentence for a separate subsequent conviction is not additional punishment for the prior refusal. Wisconsin's accelerated penalty structure for OWI-related offenses therefore does not violate the Fourth Amendment.

ARGUMENT

The court of appeals erred when it found Wisconsin's accelerated OWI penalty structure unconstitutional.

A. Imposing civil penalties for an improper refusal to submit to a lawful request for a blood sample under an implied consent law and using that revocation to enhance the sentence for a separate subsequent criminal offense, does not violate the Fourth Amendment.

Under Wisconsin law, an improper refusal to submit to a lawful request for a blood sample under the implied consent law results in revocation of a person's operating privilege. Wis. Stat. § 343.305(10). And under Wisconsin's accelerated penalty enhancement structure, a "revocation for improper refusal to take a chemical test that law enforcement has requested counts the same as an OWI conviction for purposes of increasing statutory penalties." *City of Cedarburg v. Hansen*, 2020 WI 11, ¶ 15, 390 Wis. 2d 109, 938 N.W.2d 463.

In *Forrett*, the court of appeals found Wisconsin's accelerated penalty structure unconstitutional. It relied primarily on *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2185 (2016), and *State v. Dalton*, 2018 WI 85, 383 Wis. 2d 147, 914 N.W.2d 120. But neither case supports the court of appeals' decision.

Birchfield held that a State may penalize an improper refusal to submit to a lawful request for a blood sample under an implied consent law by revoking the person's operating privilege. *Birchfield*, 136 S. Ct. at 2185. But a State may not make it a crime to refuse because imposing a criminal penalty for refusing a blood test would impermissibly burden a person's Fourth Amendment right to be free from an unreasonable search. *Id.* at 2185–86.

Dalton held that when a circuit court explicitly imposes a longer sentence for an OWI because the person refused a blood test in the same case, it impermissibly burdens the person's Fourth Amendment right to be free from an unreasonable search and violates *Birchfield*. *Dalton*, 383 Wis. 2d 147, ¶ 68. Neither *Birchfield* nor *Dalton* held that using a revocation of a person's operating privilege to enhance the sentence for a separate subsequent OWI conviction violates the Fourth Amendment.

Forrett argues that Wisconsin's accelerated OWI penalty structure "allow[s] for exactly what *Birchfield* prohibits—the imposition of criminal penalties based on the refusal to submit to a blood draw." (Forrett's Br. 15.) He asserts that "Under established case law, a defendant may not be penalized for exercising a protected right." (Forrett's Br. 15.)

It is true that a person cannot be penalized for exercising a constitutional right. "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 while a person's exercise of a constitutionally protected right *cannot* be penalized, a person's improper refusal to submit to a lawful request for a blood sample under an implied consent law *can* be penalized. In *Birchfield*, the Supreme Court affirmed that its prior opinions "referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply, and it said "nothing we say here should be read to cast doubt on" those laws. *Birchfield*, 136 S. Ct. at 2185 (citing *South Dakota v. Neville*, 459 U.S. 553, 560 (1983); *Missouri v. McNeely*, 569 U.S. 141, 161

(2013)). The "civil penalties" the Court approved include revocation of the person's operating privilege. *Birchfield*, 136 S. Ct. at 2169; *McNeely*, 569 U. S. at 161. This Court quoted *Birchfield* as approving of "implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply" in *Dalton*, 383 Wis. 2d 147, ¶ 58, and the Supreme Court did the same in *Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2533 (2019). Courts throughout the United States have recognized that under *Birchfield*, a State may impose civil penalties and evidentiary consequences for an improper refusal to submit to a lawful request for a blood sample. *State v. Levanduski*, 2020 WI App 53, ¶ 14 n.6, 393 Wis. 2d 674, 948 N.W.2d 411 (citing cases).

Forrett argues that *Birchfield* held that "refusal to submit to a warrantless blood draw is constitutionally permissible in the exercise of one's Fourth Amendment right to be free from a warrantless search—it is not a prior conviction for drunk driving." (Forrett's Br. 18.) A person can, of course, refuse a warrantless search. But as Forrett acknowledges, in *Birchfield* the Court considered "whether laws 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." (Forrett's Br. 13.) And the Court concluded that civil penalties and evidentiary consequences may be imposed for improperly refusing. (Forrett's Br. 12–13.) Since a person *cannot* be penalized for exercising a constitutional right but *can* be penalized for improperly refusing a lawful request for a blood sample, it follows that a person does not have a constitutional right to refuse when only civil penalties are threatened and imposed. Alternatively, if there is such a right, it is a right that may be penalized when it is exercised.

A person has a Fourth Amendment right to be free from an unreasonable search. *Dalton*, 383 Wis. 2d 147, ¶ 38. But a blood draw under the implied consent law is a reasonable search so long as criminal penalties are not threatened or imposed for refusing. *Birchfield*, 136 S. Ct. at 2185–86; *Dalton*, 383 Wis. 2d 147, ¶ 58; *Levanduski*, 393 Wis. 2d 674, ¶ 12. Wisconsin's law is constitutional because it authorizes the revocation of a person's operating privilege and the use of a refusal in court but does not make it a crime to refuse. *Milewski v. Town of Dover*, 2017 WI 79, ¶¶ 204-05, 377 Wis. 2d 38, 899 N.W.2d 303 (Abrahamson, J., dissenting.)

B. Using a prior offense to enhance the sentence for a subsequent offense does not punish the prior offense.

The court of appeals concluded that "inclusion of revocations for refusals to submit to a warrantless blood draw under Wisconsin's penalty scheme, which clearly results in an increased penalty, is a consequence which is outside the limit permitted by the Fourth Amendment." *State v. Forrett*, 2021 WI App 31, ¶ 14, 961 N.W.2d 132 (Ct. App. 2021). The court said that "it is unconstitutional under *Birchfield* when there is an increased penalty based on the refusal of a warrantless blood test." *Id.*

As the State explained in its opening brief, the court of appeals was wrong. First, it is the revocation—not the refusal—that counts as a prior offense. Wis. Stat. §§ 343.307(1); 346.65(2). Second, the increased penalty for Forrett's current offense is not additional punishment for his refusal in a prior case, just as it is not additional punishment for any of Forrett's five other countable prior offenses.

It is well established that an enhanced punishment for a repeat offense is not additional punishment for the prior offense. In *Ingalls v. State*, 48 Wis. 647, 4 N.W. 785 (1880), this Court recognized that "[t]he increased severity of the

punishment for the subsequent offence is not a punishment of the person for the first offence a second time, but a severer punishment for the second offence." *Id.* at 794. In *Gryger v. Burke*, 334 U.S. 728 (1948), the United States Supreme Court concluded that a "sentence as a fourth offender or habitual criminal is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes. It is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one." *Id.* at 732. The Court reaffirmed that the using a prior offense to enhance the sentence for a subsequent offense does not punish the prior offense in cases including *Nichols v. United States*, 511 U.S. 738 (1994): *Witte v. United States*, 515 U.S. 389 (1995): and *United States v. Rodriguez*, 553 U.S. 377, 386 (2008). In *Nichols*, the Supreme Court concluded that even if the person could not have been jailed for the prior offense, use of the offense to increase the prison sentence for a subsequent offense does not punish the prior non-jailable offense. *Nichols*, 511 U.S. at 747. And in *State v. Schuman*, 186 Wis. 2d 213, 520 N.W.2d 107 (Ct. App. 1994), the court of appeals recognized that a sentence for a third offense OWI "is not an additional, retroactive, penalty" for the prior offenses, but merely punishes the "subsequent crime more severely based on" the prior offenses. *Id.* at 215, 218.

Forrett claims that these cases are inapposite and do not support the State's argument because in each case a defendant's prior criminal conviction was used to enhance a subsequent conviction. (Forrett's Br. 20–22.)

However, while these cases involved the use of a conviction rather than a revocation for sentence enhancement, that is a distinction without a difference. In each case, the U.S. Supreme Court, this Court, or the court of appeals recognized that when a sentence is enhanced by a prior offense, the increased severity of the punishment for the subsequent offense is punishment for that offense—not punishment for the prior offense. It makes no difference whether the prior offense was jailable. *Nichols*, 511 U.S. at 747. And logically it makes no difference that a prior offense is one for which only civil penalties can be imposed. If only a criminal conviction could be used for sentence enhancement, it would be impermissible to use a revocation for improperly refusing a breath test, or a first offense OWI, to enhance the sentence for a subsequent OWI. Under Wisconsin law, neither a revocation for improperly refusing a breath test nor a first offense OWI is a crime. Under the court of appeals' reasoning, using a revocation for refusing a breath test, or a first offense OWI, to increase the sentence for a subsequent OWI would criminally punish the prior civil offense.

But Wisconsin law requires the counting of civil first offense OWIs in Wisconsin and revocations for improper refusing a blood test or a breath test in Wisconsin or another State, as prior offenses. *Hansen,* 390 Wis. 2d 109, ¶¶ 15–16. "Wisconsin's progressive OWI penalties are mandatory directives from the legislature 'to encourage the vigorous prosecution of offenses concerning the operation of motor vehicles by persons under the influence. . .'" *Id.,* ¶ 17 (quoting Wis. Stat. § 967.055(1)(a)). Nothing in *Birchfield* or *Dalton* (both of which were decided before *Hansen*) or any other case until *Forrett* even suggests that this is somehow improper. Notably. Forrett cites no case other than *Forrett* even suggesting that an increased sentence for a subsequent offense is really additional punishment for the prior offense.

In addition, an improper refusal to submit to a lawful request for a blood sample is an unlawful act for which a State may impose civil penalties. *Birchfield*, 136 S. Ct. at 2185–86; *Dalton*, 383 Wis. 2d 147, ¶ 58. In Wisconsin, the civil penalties for improperly refusing may be harsher than the penalties for an OWI. For instance, if a person with no prior countable suspensions, revocations, or convictions, is convicted of OWI, his operating privilege is revoked for six to nine months. Wis. Stat. § 343.30(1q)(b)2. But if the person improperly refuses a lawful request for a blood sample, the revocation is for one year. Wis. Stat. § 343.305(10)(b)2. A person who improperly refuses is also subject to an ignition interlock device (IID) order for twelve months, Wis. Stat. § 343.301(1g)(a)1., and is prohibited from driving with an alcohol concentration above .02 while subject to the IID order. Wis. Stat. § 340.01(46m)(c).

Forrett claims that under the State's argument, the exercise of a constitutional right—such as the right to a jury trial, the right to remain silent, or the right to refuse to allow police to enter a person's house—in one case, could be used to enhance the penalty in a subsequent case. (Forrett's Br. 19–20.)

However, a person who exercises his constitutional right to a jury trial, to remain silent, or to refuse to allow police to enter his house cannot be penalized. He will not lose a privilege, and the fact that the person exercised his constitutional right cannot be used against him in court. In contrast, a person who improperly refuses a lawful request for a blood sample under an implied consent law is penalized, including the revocation of his operating privilege, and his refusal can be used against him in court. *Birchfield*, 136 S. Ct. at 2185; *Dalton*, 383 Wis. 2d 147, ¶ 58; *Levanduski*, 393 Wis. 2d 674, ¶¶ 14–15.

Forrett argues that using a revocation for improperly refusing to take a lawfully requested blood test for sentence enhancement is improper under *Dalton*, because in that case, this Court concluded that a refusal to take a blood test cannot be considered an aggravating sentencing factor. (Forrett's Br. 21.) But *Dalton* held only that a court may not explicitly impose a longer sentence for an OWI-related offense because of an improper refusal to take a blood test in the same case. *Dalton*, 383 Wis. 2d 147, ¶ 67. This Court said nothing even suggesting that a court may not use a revocation for improper refusal in one case for sentence enhancement in a subsequent case. And again, it is the revocation, not the refusal that is used to enhance the sentence for a separate subsequent offense.

C. Under the court of appeals' reasoning, any statute that increase the punishment because a person is a recidivist would be invalid.

In its opening brief, the State explained that if the court of appeals were correct that using a prior offense to enhance a subsequent offense is additional punishment for the prior offense, numerous Wisconsin statutes would be rendered invalid. Forrett asserts that the State misconstrues the court of appeals' reasoning and exaggerates the impact of the court's decision. (Forrett's Br. 23.) Forrett claims that the court of appeals' decision applies only to convictions for OWI and operating after revocation, (Forrett's Br. 25), and that "Nothing in the court of appeals' decision prohibits the use of penalty enhancer statutes that punish recidivism based on prior criminal convictions." (Forrett's Br. 24.)

However, the court of appeals said that under Wisconsin's law, a person's operating privilege "revocation results in an increased penalty—albeit delayed." *Forrett*, 2021 WI App 31, ¶ 14. And the court concluded that this increased penalty is therefore a criminal penalty for the prior refusal. *Id.*

The court's conclusion is wrong under *Ingalls*, 48 Wis. 647, *Gryger*, 334 U.S. 728, *Nichols*, 511 U.S. 738, *Witte*, 515 U.S. 389, *Rodriguez*, 553 U.S. 377, and *Schuman*, 186 Wis. 2d 213. And the court of appeals' reasoning would apply to other recidivist statutes that rely on prior criminal or civil offenses to enhance the sentence for a subsequent conviction. For instance, the maximum penalty for violating Wisconsin's OWI homicide statute, Wis. Stat. § 940.09, is 25 years of imprisonment, except that if the person has a prior countable offense, the maximum penalty is 40 years. Wis. Stat. §§ 939.50(3)(c), 940.09(1c)(b). Under the court of appeals' reasoning, whether the prior offense is an OWI or a revocation for improperly refusing a blood test or a breath test, 15 years of imprisonment would be punishment for the non-criminal prior offense—albeit delayed.

The same would also be true for offenses like possession of cocaine, LSD, or THC, which are misdemeanors if a first offense, but felonies if a second or subsequent offense. Wis. Stat. §§ 961.41(3g)(c), (d), and (e). The increased imprisonment for a second offense (a maximum of three years and six months in prison) from a first offense (a maximum of one year in jail) is obviously not additional punishment for the first offense. If it were, any sentence above one year for a second or subsequent offense would violate the statute.

However, under these and other recidivist statutes, an increased sentence for a subsequent offense punishes only the subsequent offense, not the prior offense. The court of appeals' conclusion that Forrett was criminally punished for improperly refusing a blood test in 1996 when his revocation was used to enhance his 2017 OWI is simply wrong.

CONCLUSION

This Court should reverse the court of appeals' decision and affirm Forrett's judgment of conviction for OWI as a seventh offense.

Dated: January 13, 2022.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (c) (2019-20) for a brief produced with a proportional serif font. The length of this brief is 2987 words.

MICHAEL C. SANDERS
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12) (2019–2020)

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) (2019–20).

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 13th day of January 2022.

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