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WISCONSIN COURT OF APPEALS
DISTRICT IV

VILLAGE OF LOMIRA,

Appeal No. 2020-AP-000031

Plaintiff-Respondent,

Circuit Court Case No. 2019-TR-005045

Circuit Court of Dodge County

-v-

Hon. Brian Pfitzinger, Presiding

PHILLIP N. BENNINGHOFF,

Defendant-Appellant.

DEFENDANT-APPELLANT'S REPLY BRIEF
AND SUPPLEMENTAL APPENDIX

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ARGUMENT

I. Synopsis of Village of Lomira's Theory of the Case.

The Village of Lomira appears to maintain in its Brief that Wis. Stat. §343.305, the “implied consent” law, is sufficient to constitute waiver of any constitutional Fourth Amendment pre-requisite of a warrant for a blood draw intoxication test request by a police officer despite the absence of “exigent circumstances.” (The Village cites *State v. Nordness*, 128 Wis.2d 15, 381 N.W.2d 300 (1986) as the authority for this position.)

Second, the Village cites *Village of Elm Grove v. Brefka*, 2013 WI 54, ¶13, 384 Wis.2d 282, 832 N.W.2d 121 (2013), but concedes that Mr. Benninghoff requested and was refused a due process hearing on issues not contemplated as being within the scope of the enumerated issues found in Wis. Stat. §343.305(9)(a)5, which are the only issues subject to the ten (10) day rule of Wis. Stat. §343.305(10).

Third, the Village relies exclusively upon *Nordness, supra*, which was a 1986 breath test case, as somehow superseding the clear import of the United States Supreme Court's subsequent express differentiation between the Fourth Amendment's warrant requirement for an invasive blood test versus breath tests. [*Birchfield v. North Dakota*, 579 U.S. ___, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016); reiterated in *Mitchell v. Wisconsin*, ___ U.S. ___, 139 S.Ct. 2525; 204 L.Ed.2d 1040 (2019).]

Fourth, the Village avoids addressing lack of subject matter jurisdiction as an issue upon which the circuit court refused to conduct a hearing. In so doing, the Village ignores the jurisdictional enabling language of the “implied consent statute” itself found at Wis. Stat. §343.305(2), and argues instead that this issue is

in reality a “probable cause” issue relating to the arresting officer’s conduct – not the court’s jurisdiction.

II. Wis. Stat. §343.305 Violates The Fourteenth Amendment “Due Process” Clause By Denying An Accused Pre-Deprivation Judicial Review Of A Warrantless Blood Test Demand By A Police Officer.

The Village of Lomira does not directly dispute that a warrantless blood draw demanded by a police officer in the absence of “exigent circumstances” violates the Fourth Amendment. Yet, the mere assertion to a police officer of one’s right under the Fourth Amendment to require issuance of a warrant before submitting to an invasive blood draw is deemed a refusal under Wis. Stat. §343.305. Thus, the lockstep result of invoking this constitutional right is the revocation of the accused person’s driver’s license; imposition of an ignition interlock device on any vehicle registered or operated by the accused person, and exposure to enhanced recidivist punishment in the event of a future vehicular intoxication charge. All of these consequences are imposed by the State of Wisconsin upon the accused person without an opportunity to contest the legal efficacy of that person’s assertion of their Fourth Amendment rights, and in the absence of any conviction for the underlying charge of operating a motor vehicle while intoxicated.

The Village of Lomira cites *State v. Nordness*, 128 Wis.2d 15, 381 N.W.2d 300 (1986) in support of its position. Justice Ceci, writing for the Supreme Court, begins the opinion by reciting:

There is no question that the revocation of a driver’s license for a statutorily defined purpose is a protectable property interest which implicates due process protections.

Nordness, supra, 381 N.W.2d at 306.

That the Supreme Court’s analysis in *Nordness* was expressly based upon the facts in *Nordness* is exemplified by the following quote:

Given the facts of the case before us, we conclude that the due process analysis of Batchelder is appropriate. We hold that the hearing as established by section 343.305(3)(b)4-5, Stats., provided Nordness with all the constitutional process to which he was due. Although Nordness has a significant property interest in the revocation of his license, he was extended a pre-deprivation hearing to guard against the possibility of erroneous deprivation of that interest. (emphasis added.)

Nordness, supra, 381 N.W.2d at 307.

If the material facts of Mr. Benninghoff's case were the same, the *Nordness* analysis would be of major import. However, *Nordness* was a breath test demand case, not a blood draw demand case as exists here. [A more legible copy of the "Informing The Accused" form demanding a "blood" draw is provided in the Supplement Appendix at p. 101.] This material fact is specifically referenced by the Court of Appeals in its unpublished opinion in *State v. Nordness*, 123 Wis.2d 541, 367 N.W.2d 243 (Ct. App. 1985). [A copy of this unpublished appellate court decision is included within the Supplemental Appendix accompanying this Reply Brief. It is not cited here for any precedential value, but solely for the purpose of establishing that *Nordness* was a breath test case and not a blood draw case.] The significance of this material fact completely alters the analysis of what process is due the accused person at a pre-revocation hearing in a warrantless blood draw case based on the U.S. Supreme Court holdings in *Birchfield v. North Dakota*, 579 U.S. ___, 136 S.Ct. 2160, at 2185, 195 L.Ed.2d 560 (2016) and *Mitchell v. Wisconsin*, __ U.S. ___, 139 S.Ct. 2525 at 2534, 204 L.Ed.2d 1040 (2019).

III. Wis. Stat. §343.305(9) and (10), As Applied, Deny An Accused Person Of A Constitutionally Required Pre-Deprivation Due Process Hearing On Lack Of Subject Matter Jurisdiction Under Wis. Stat. §343.305.

Phillip Benninghoff did not request what is popularly styled a "refusal" hearing within the 10 day period provided by Wis. Stat. §343.305(9)(a) because the issues allowed to be raised at such a hearing do not include "implied consent" subject matter jurisdiction as referenced in Wis. Stat. §343.305(2) in the

case of operating a motor vehicle not on a public highway or an area enumerated in Wis. Stat. §346.61.

The issue is whether a defendant has the “due process” right to a hearing on subject matter jurisdiction where the jurisdictional predicate to invoking the “implied consent” statute limits it to the public highways of the State of Wisconsin and designated areas under Wis. Stat §346.61 per Wis. Stat. §343.305(2). This is an essential element of the “implied consent” statute as to which the prosecution has the burden of proving before the court has jurisdiction to peremptorily revoke a person’s operating privileges under Wis. Stat. §343.305(10). That is exactly the procedure which counsel for Mr. Benninghoff followed. Procedural “due process” ... in the context of an implied consent refusal case “requires that the State afford the defendant notice and an opportunity to be heard at a meaningful time and in a meaningful manner.” *State v. Moline*, 170 Wis.2d 531, 540-41; 489 N.W.2d 667 (Ct. App. 1992). The current wording of the implied consent statute and “Notice of Intent To Revoke” form specifically informs the defendant that he or she cannot contest subject matter jurisdiction under the “implied consent” statute as an issue to be adjudicated at a run of the mill statutory “refusal” hearing. Nevertheless, the Fourteenth Amendment to the United States Constitution requires that some forum be provided to an accused person to contest jurisdiction before they are deprived of their license by a court.

CONCLUSION

Wis. Stat. §343.305 violates the Fourth and Fourteenth Amendments to the Constitution of the United States. Wisconsin’s “implied consent” law denies a person accused of intoxicated operation of a motor vehicle any forum or any procedural methodology whatsoever to challenge revocation of their driver’s license based upon assertion of their constitutional Fourth Amendment right to

refuse to submit to a warrantless blood draw in the absence of “exigent circumstances.”

Furthermore, the trial courts of the State of Wisconsin are absolutely prohibited by this statute, as applied, from conducting any hearing related to revocation of a driver’s license under Wis. Stat. §343.305(9)(c), (a)5 and (10) based upon lack of subject matter jurisdiction, because that fundamental issue is not within the justiciable issues enumerated therein.

The judicial orders of the Circuit Court of Dodge County entered in this matter revoking Phillip Benninghoff’s motor vehicle operating privileges and imposing other penalties and obligations simply based upon his refusal to submit to a warrantless invasive blood draw, must be reversed and voided. In addition, Mr. Benninghoff’s refusal to submit to chemical testing of his blood in this matter cannot be admitted into evidence or referred to in any way in this or in future proceedings relating to his operation of a mo-ped on August 31, 2019.

Respectfully submitted this 22nd day of September, 2020.

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Electronically Signed By

/s/ *Joseph F. Owens*

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CERTIFICATION AS TO FORM AND LENGTH OF APPELLATE BRIEFS

I hereby certify that this Reply Brief conforms to the rules contained in Wis. Stat. Section 809.19(8)(b) and (c) for a brief produced using the following font:

Proportional serif font: Minimum printing resolution of 200 dots per inch with an equivalent to 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 1,382 words.

Dated at New Berlin, Wisconsin on September 22, 2020.

Electronically Signed By

/s/ Joseph F. Owens

Attorney Joseph F. Owens

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**CERTIFICATE OF COMPLIANCE WITH
WIS. STAT. §809.19(12)(f)-ELECTRONIC BRIEF CERTIFICATION**

I hereby certify that:

I have submitted an electronic copy of the Defendant-Appellant's Reply Brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §809.19(12)(f).

I further certify that:

This electronic brief is identical in content and format to the printed form of the Defendant-Appellant's Reply Brief filed as of this date.

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

Dated at New Berlin, Wisconsin on September 22, 2020.

Electronically Signed By

/s/ Joseph F. Owens

Attorney Joseph F. Owens

State Bar No: 1016240

APPELLANT'S REPLY BRIEF SUPPLEMENTAL APPENDIX CERTIFICATION

I hereby certify that filed with this Reply Brief, either as a separate document or as a part of this brief, is a Supplemental Appendix that complies with §809.19(2)(a) and that contains, at a minimum:

(1) a table of contents; (2) any findings or opinion of the circuit court not previously included in the original Appendix accompanying the Appellant's principal Brief; (3) a copy of any unpublished opinion cited under Wis. Stat. §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 at New Berlin, Wisconsin on September 22, 2020.

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