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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 20 AP 1218 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

JOHN R. ANKER,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ON APPEAL FROM A FINAL ORDER
ENTERED ON FEBRUARY 21, 2020, BY THE
COLUMBIA COUNTY CIRCUIT COURT,
THE HONORABLE TODD J. HEPLER PRESIDING.

Respectfully submitted,

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Defendant-Appellant

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STATEMENT ON PUBLICATION

Defendant-appellant does not request publication of the opinion in this appeal.

STATEMENT ON ORAL ARGUMENT

Oral argument would be appropriate in this case only if the Court concludes that the briefs have not fully presented the issues being raised on appeal.

STATEMENT OF THE CASE AND FACTS

This is an appeal from the trial court's denial of Mr. Anker's two motions, in which he moved to suppress evidence derived from his unlawful detention to complete field sobriety testing, as well as the results of an evidentiary chemical analysis of his blood after an arrest for operating while under the influence of an intoxicant.[1] Mr. Anker also appeals the State's use of his declining to submit to a blood test as consciousness of guilt.

On November 10, 2018, Officer Scott Anderson arrested Mr. Anker for operating while under the influence of an intoxicant ("OWI").[2] Officer Anderson placed Mr. Anker in the back of his squad car.[3] Still in the squad car, the officer read the Informing the Accused form ("ITAF").[4] After the officer read Mr. Anker the ITAF, he asked Mr. Anker whether he would submit to a blood test.[5] A back-and-forth exchange occurred.[6] Mr. Anker asked for an attorney before he submitted to the test.[7] The officer did not tell Mr. Anker he did not have the right to an attorney but noted Mr. Anker's request for an attorney would be considered refusing testing.[8] After obtaining a warrant, Officer Anderson took Mr. Anker to the hospital, where his blood was drawn.[9] On November 26, 2018, the Wisconsin State Laboratory of

[1] R.13; R.24.
[2] R.3.
[3] R.67 at 22.
[4] *Id.*
[5] *Id.*
[6] *Id.* at 24.
[7] *Id.*
[8] *Id.*
[9] R.42; R.45.

Hygiene tested Mr. Anker's blood sample for the presence of ethanol.[10] The reported value was 0.114 g/100mL.[11]

On January 16, 2019, the Columbia County District Attorney's Office charged Mr. Anker with operating a motor vehicle while under the influence of an intoxicant and operating with a prohibited alcohol concentration, both as a third offense.[12] Mr. Anker moved to suppress his unlawful detention for field sobriety testing.[13] At a later date, Mr. Anker also moved to suppress the test result because the officer misrepresented the consequences of submitting and refusing the blood test.[14]

On May 10, 2019, the Honorable Todd J. Hepler presided over an evidentiary hearing on the unlawful detention motion. At the hearing, Officer Anderson testified that he was on patrol at approximately 8:20 PM on November 10, 2018 when he observed a vehicle traveling without a front license plate.[15] He testified he noted no significant driving behavior.[16] After making contact with Mr. Anker, Officer Anderson noted a strong odor of intoxicant emitting from the vehicle, that Mr. Anker's eyes were glossy and bloodshot, and that Mr. Anker's speech was slow and slurred.[17] When asked, Officer Anderson testified Mr. Anker admitted to consuming

[10] R. 45.
[11] *Id.*
[12] R.3.
[13] R.13.
[14] R.24. Mr. Anker also filed a motion to suppress blood test results based on withdrawal of consent. That motion is not being appealed.
[15] R.67 at 6.
[16] *Id.* at 7.
[17] *Id.* at 8.

one beer 30 minutes prior to driving that evening.[18] Mr. Anker also stated his license plate had fallen off after striking a deer.[19] After returning to his squad vehicle, Officer Anderson noted Mr. Anker had two prior OWI convictions.[20]

Officer Anderson testified he read the ITAF to Mr. Anker. Upon being read the ITAF, he testified Mr. Anker asked for an attorney to consult with regarding his rights. Officer Anderson testified that at no point did he advise Mr. Anker he had no right to an attorney.[21] He marked the matter down as a refusal to submit to blood testing.[22]

At the May 10, 2019 hearing, the court denied the unlawful detention motion relying especially on "the contradiction between Mr. Anker's suggestion that he had one beer a half hour prior, and the looks and smells of the officer . . . observed at the scene[.]"[23] The court did not address the motion on the refusal filed under ***State v. Baratka***.[24] The court imposed a briefing schedule on the ***Baratka*** issue of invocation of counsel not constituting a refusal.[25] The May 10, 2019 hearing was not a refusal hearing and the court did not examine each issue under Wis. Stat. 343.305(9)(a)5.a with respect to a refusal. Nor did the State request a refusal hearing

[18] *Id.* at 9; 10.
[19] *Id.* at 11.
[20] *Id.* at 12.
[21] *Id.* at 24.
[22] *Id.*
[23] *Id.* at 32.
[24] R.67 at 3–4.
[25] *Id.* at 32–33.

at the May 10, 2019 hearing. Similarly, the court did not examine Fourth Amendment privacy protections with respect to a blood test.[26]

On October 16, 2019, Mr. Anker moved to suppress the use of the refusal against him at trial, based on coercive and incorrect information in the Informing the Accused document. On October 23, 2019, the court denied the defense motion. On November 15, 2019, Mr. Anker moved for reconsideration on the defense motion to suppress the use of the refusal against him at trial.[27] On November 14, 2019, the court denied the motion for reconsideration.[28] In its decision, the court did not address the caselaw cited by Mr. Anker.[29] Instead, the court simply stated that because law enforcement relied upon a warrant to seize a blood sample, the search "was not a violation of the Fourth Amendment."[30]

On February 10, 2020, Mr. Anker filed a motion in limine to preclude reference to the refusal by the State at trial.[31]

On February 20, 2020, the court presided over a jury trial in the case. Before the jury was summoned, the court addressed defense counsel's motion to preclude the State from referring to Mr. Anker's refusing to submit to blood testing at trial. Defense counsel began by pointing out no refusal hearing had occurred, which was required before any refusal could be mentioned.[32] Counsel further argued that

[26] *Id.* at 31–32. The court denied the motion in a written decision. *See* R.26.
[27] R.27.
[28] R.28.
[29] *Id.*
[30] *Id.*
[31] R.50
[32] R.68 at 13.

because this was a criminal OWI trial, the State could not use the refusal to submit to blood testing as evidence of consciousness of guilt based on ***Birchfield v. North Dakota*** and ***State v. Dalton***.[33] As a defendant had the right to refuse a blood test based on his right to be free from unreasonable searches under the Fourth Amendment, the State could not use the evidence of refusal as consciousness of guilt (or for any other purpose.).[34]

The State argued that ***State v. Donner*** allowed due process to be satisfied for a refusal hearing when a court addresses the refusal in some type of hearing before the OWI trial.[35] In response, defense counsel pointed out the Court of Appeals issued the ***Donner*** decision pre-***Birchfield*** and pre-***Dalton***.[36] On the subject of whether a refusal to submit to blood testing could be introduced as evidence in an OWI trial, the State argued:

> [T]he United States Supreme Court has in the past approved the imposition of evidentiary consequences, the fact that a refusal could be used against somebody and nothing in Birchfield should be read to cast doubt on these prior rulings. Under prior Wisconsin law, the introduction of evidence of a refusal is admissible at an OWI trial. So I think the court should deny this motion.[37]

[33] R.68 at 13; ***Birchfield v. North Dakota***, 136 S. Ct. 2173 (2016); ***State v. Dalton*****,** 2018 WI 85, 383 Wis. 2d 147, 914 N.W.2d 120.
[34] R.68 at 15.
[35] *Id.* at 16.
[36] *Id.* at 18.
[37] *Id.* at 18.

Defense counsel pointed out that the issue was a Fourth Amendment one, not concerning the legality of the implied consent law.[38] Counsel also noted Mr. Anker's constitutional right "supersedes any statutory law imposed by the legislature."[39]

The court declared that Mr. Anker received a hearing on the refusal on August 20, 2019, when the court issued its decision on the motion to suppress, despite the State not requesting a refusal hearing on that date or the court examining criteria under Wis. Stat. 343.305(9)(a)5.a..[40]With respect to whether the refusal could be used in the OWI trial, the court deferred to the State's arguments regarding implied consent and ***Birchfield***.[41]

During the trial, the State solicited testimony from Officer Anderson on Mr. Anker declining to submit to the blood test after invoking his right to an attorney.[42] Over defense counsel's objection, the court instructed the jury to consider the refusal to submit to blood testing, "giving to it the weight you believe it is entitled to receive."[43]

On February 20, 2020, a jury convicted Mr. Anker of operating while under the influence of an intoxicant and operating with a prohibited alcohol concentration,

[38] *Id.* at 19.
[39] *Id.*
[40] *Id.*
[41] *Id.* at 21.
[42] R.68 at 139.
[43] *Id.* at 314; 328.

both as a third offense.[44] On February 21, 2020, the court sentenced him for operating while under the influence of an intoxicant as a third offense.[45]

Mr. Anker now appeals the circuit court's order denying his two motions and permitting the State to use Mr. Anker's declination to submit to the blood test as consciousness of guilt at trial.

ARGUMENT

Mr. Anker respectfully requests that this Court vacate his conviction and remand the case for a new trial.

I. MR. ANKER'S DETENTION FOR FIELD SOBRIETY TESTING WAS WITHOUT REASONABLE SUSPICION HE COMMITED A DRUNK DRIVING OFFENSE.

A. Standard of Review

A circuit court's findings are subject to a clearly erroneous standard of review.[46] An appellate court reviews application of historical facts to constitutional claims independently of the circuit court's analysis.[47]

B. There were no specific, articulable facts indicating Mr. Anker operated while impaired.

At the suppression hearing, Officer Anderson testified that at 8:23 p.m. on November 10, 2019, he stopped Mr. Anker's vehicle for not having a front license

[44] R.68 at 354.
[45] R. 69 at 14.
[46] ***State v. Floyd***, 2017 WI 78, ¶ 11, 377 Wis. 2d 394, 898 N.W.2d 560.
[47] ***Id.***

plate attached.[48] He did not observe any traffic violations beyond the license plate.[49] Nor did he observe any suspicious (though technically legal) driving behavior.[50] Upon making contact with Mr. Anker, Officer Anderson testified he noted a strong odor of intoxicants emitting from the vehicle, that Mr. Anker's eyes were "glossy and bloodshot," and that his speech was slow and slurred.[51] Officer Anderson testified Mr. Anker disclosed he consumed one beer 30 minutes before driving.[52]

On cross examination, Officer Anderson admitted that an individual may have other reasons for having bloodshot eyes irrespective of alcohol consumption.[53] There was no testimony as to how bloodshot eyes are relevant to impaired driving. He also admitted Mr. Anker answered his questions appropriately and did not seem confused.[54] Finally, he did not note any fumbling with a wallet but noted that Mr. Anker may had trouble locating his proof of insurance.[55]

The State noted the ***State v. Smith*** case involved an extension of a traffic stop.[56] In ***Smith***, the Wisconsin Supreme Court upheld the detention of the appellant, who was stopped for the registered owner having a suspended license.[57] However, the ***Smith*** case involved a situation where the reasonable suspicion

[48] R.67 at 6; 14.
[49] *Id.*
[50] *Id.* at 16.
[51] *Id.* at 8.
[52] *Id.*
[53] *Id.* at 17.
[54] *Id*. at 17–18.
[55] *Id.* at 19.
[56] *Id.* at 26.
[57] ***State v. Smith***, 2018 WI 2, ¶ 21, 379 Wis. 2d 86, 905 N.W.2d 353.

dissipated before the officer made contact with the appellant.[58] In contrast, the focal point with respect to Mr. Anker was his detention for field sobriety testing—the moment the officer told him to step out of the vehicle. Therefore, any reliance on ***Smith*** would be misguided.

The circuit court, in issuing its ruling denying the motion, stated it was particularly relying upon "the contradiction between Mr. Anker's suggestion that he had one beer a half hour prior, and the looks and smells of the officer[.]"[59] Yet the officer did not testify that he believed Mr. Anker was dishonest about his alcohol consumption or that he believed Mr. Anker consumed a substantial amount of alcohol based on the strong odor. Nor did he testify that the disclosure of one beer consumed and the odor of intoxicants were particularly significant to him in his decision to detain Mr. Anker for field sobriety testing. Therefore, because it relied upon factors not testified to, the court's reliance on these factors was also misguided.

There was no question that Mr. Anker drove his vehicle after consuming alcohol. But there was insufficient information to conclude he operated while impaired. There were no signature hallmarks of an impaired person: no swerving, no difficulty understanding the officer, no dexterity issues noted. While there was an odor of alcohol and bloodshot eyes, an odor of alcohol indicates someone was

[58] ***Id.***
[59] R.67 at 32.

drinking—not that he was impaired. The bloodshot eyes were acknowledged to have multiple potential causes.[60]

The ***County of Sauk v. Leon*** case is instructive.[61] In ***Leon***, the appellant was detained by a deputy after his passenger was walking near a Highway after 11:00 p.m. on a Friday.[62] The appellant was on foot and his passenger created a disturbance.[63] The appellant exhibited an odor of intoxicants, admitted to consuming one drink with dinner, but did not have any trouble with balance, any bloodshot eyes or slurred speech.[64] He also promptly retrieved his driver's license.[65] The Court in ***Leon*** noted that "When an officer is not aware of bad driving, then other factors suggesting impairment must be more substantial."[66]

Here, as in ***Leon***, "the record is simply devoid of facts from which reasonable inferences could be drawn that [Mr. Anker]" was impaired.[67] For those reasons, the court's denial of the motion must be reversed. Had the court granted the suppression motion, Mr. Anker would have prevailed at trial.

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[60] *Id.* at 17.
[61] ***Cnty. of Sauk v. Leon***, 2011 WI App 1, ¶ 20, 330 Wis. 2d 836, 794 N.W.2d 929 (unpublished but citable).
[62] ***Id.***
[63] ***Id.***
[64] ***Id.*** ¶ 9.
[65] ***Id.***
[66] ***Id.*** ¶ 20.
[67] ***Id.*** ¶ 23.

II. THE CIRCUIT COURT INCORRECTLY DENIED MR. ANKER'S MOTION TO PROHIBIT REFERENCE TO HIS REFUSAL AT TRIAL AND ERRONEOUSLY ALLOWED THE STATE TO ELICIT TESTIMONY DEMONSTRATING CONSCIOUSNESS OF GUILT.

A. Standard of Review

An appellate court reviews *de novo* a circuit court's legal conclusions.[68] An appellate court reviews a circuit court's findings based on clearly erroneous review.[69]

B. Under established federal and state caselaw, an individual has a right to be free from unreasonable searches and seizures.

A staggering amount of personal information can be acquired by the analysis of a sample of blood. The presence of alcohol, drugs, or other chemicals can be detected; as well as genetic information about ancestry, family connections, medical conditions, pregnancy, and profiles suitable for identification purposes. For these reasons, the United States Supreme Court has recognized that the chemical analysis of a blood sample is an invasion of an individual's privacy.[70]

The United States Supreme Court has consistently recognized an expectation of privacy in the information contained within biological samples—a privacy interest distinct from the collection of the samples in the first place. In the 1989 case ***Skinner v. Railway Labor Executives' Association***, the Court explained:

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[68] ***State v. Guzman***, 166 Wis. 2d at 586.
[69] ***State v. Johnson***, 2007 WI 32, ¶ 13, 299 Wis. 2d 675, 729 N.W.2d 182.
[70] ***Skinner v. Ry. Labor Executives' Ass'n***, 489 U.S. 602, 616 (1989).

> [I]t is obvious that this physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable. The ensuing chemical analysis of the sample to obtain physiological data is a further invasion of … privacy interests.[71]

In 2001, the United States Supreme Court decided the case of ***Ferguson v. City of Charleston***, where warrantless drug testing was conducted on lawfully-obtained urine samples.[72] Despite the collection of the urine itself being lawful, the Court, citing to ***Skinner***, held that "[T]he urine tests … were *indisputably* searches within the meaning of the Fourth Amendment."[73]

In ***Birchfield v. North Dakota***,[74] the Supreme Court commented on the information contained in a blood sample as distinct from a breath sample:

> [A] blood test, unlike a breath test, places in the hands of law enforcement authorities a sample that can be preserved and from which it is possible to extract information beyond a simple BAC reading. Even if the law enforcement agency is precluded from testing the blood for any purpose other than to measure BAC, the potential remains and may result in anxiety for the person tested.[75]

The caselaw is unambiguous that individuals have a legitimate and recognized privacy interest in the information contained in their own blood. The ***Randall*** lead opinion recognized the inherent privacy interest in blood, stating:

> The similarities between a smart phone and a blood sample in terms of the amount of information they each contain, and the personal nature of that information, are such that we must pay particular attention to what the Supreme Court said about the State's access to it.[76]

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[71] ***Skinner***, 489 U.S. 602, 616 (1989).
[72] ***Ferguson v. City of Charleston***, 532 U.S. 67, 73 (2001).
[73] ***Id.*** at 76 (emphasis supplied).
[74] ***Birchfield,*** 136 S. Ct. 2160 (2016).
[75] ***Id.*** at 2178.
[76] ***State v. Randall***, 2019 WI 80, ¶ 34.

In ***Riley v. California***, the United States Supreme Court addressed the applicability of the warrant requirement to cell phone searches.[77] Of course, a blood sample analysis and a cell phone search are not exactly alike. Both a cell phone and a blood sample have vast amounts of unanalyzed personal information contained within.

The question in ***Riley*** was whether police could analyze the contents of a lawfully-seized cell phone under the Fourth Amendment.[78] The Court recognized that a huge amount of personal information could be stored on or accessed through a cell phone, including information implicating significant privacy concerns, such as medical records.[79] The Court ultimately decided:

> [A] warrant is generally required before such a search, even when a cell phone is seized incident to arrest … Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant.[80]

Analyzing a blood sample, like searching a cell phone, potentially presents privacy implications sufficient to require police to obtain a warrant or a warrant exception to search these items. Because a blood sample presents considerable privacy interests, an individual's right to be free from unreasonable searches and seizures also attaches.

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[77] ***Riley v. California***, 134 S. Ct. 2473 (2014).
[78] ***Id.*** at 2480.
[79] ***Id***. at 2490.
[80] ***Id.*** at 2493, 2495.

C. Because Mr. Anker declined to submit to a blood test, the State could not use the refusal to submit to a blood test at the drunk driving trial.

On November 10, 2018, Mr. Anker was arrested for a violation of Wis. Stat. § 346.63(1)(a), operating while under the influence, and was read the Informing the Accused. The contents of that form state:

> This law enforcement agency now wants to test one or more samples of your breath, blood, or urine to determine the concentration of alcohol or drugs in your system. If any test shows more alcohol in your system than the law permits while driving, your operating privilege will be suspended. If you refuse to take any test that this agency requests, your operating privilege will be revoked, and you will be subject to other penalties. The test results or the fact that you refused testing can be used against you in court.

After being read the form, Mr. Anker did not agree to a warrantless blood draw. Blood draws are searches under the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution.[81]

Recent decisions in the United States Supreme Court, the Court of Appeals, and this Court have recognized the heightened privacy interests in an individual's blood sample. "[Blood tests] 'require piercing the skin' and extract a part of the subject's body."[82] In comparing blood tests to breath tests, the United States Supreme Court held, "Blood tests are significantly more intrusive, and their reasonableness must be judged in light of the availability of the less invasive alternative of a breath test."[83]

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[81] *See* ***Birchfield v. North Dakota***, 136 S. Ct. 2173 (2016); ***Schmerber v. California***, 86 S. Ct. 1826, 1834 (1966).
[82] ***Birchfield v. North Dakota***, 136 S. Ct. 2160, 2178, (2016) (quoting ***Skinner v. Railway Labor Executives' Assn.***, 489 U.S. 602, 625 (1989)).
[83] ***Birchfield***, 136 S. Ct. at 2184.

Birchfield involved three consolidated cases. One of the defendants, Birchfield, had been criminally prosecuted in North Dakota for refusing a warrantless blood draw. The U.S. Supreme Court reversed his conviction, rejecting the notion that the search was permitted incident to arrest and consent, stating:

> Having concluded that the search incident to arrest doctrine does not justify the warrantless taking of a blood sample, we must address respondents' alternative argument that such tests are justified based on the driver's legally implied consent to submit to them. It is well established that a search is reasonable when the subject consents, *e.g., Schneckloth v. Bustamonte,* 412 U.S. 218, 219, 93 S. Ct. 2041, 36 L.Ed.2d 854 (1973).[84]

The Supreme Court furthermore stated: "**we conclude that Birchfield was threatened with an unlawful search** and that the judgment affirming his conviction must be reversed."[85]

As recognized by the United States Supreme Court in ***Birchfield*** and the companion case of ***Beylund*** (whose case was reversed when he submitted to a warrantless blood draw after being told the law required he submit to the blood test) there are exceptions to the constitutional prohibition against warrantless searches. One such is a search made pursuant to voluntary consent.[86] Consent must be the product of a (1) free, (2) *intelligent*, (3) unequivocal, (4) specific choice, (5) without

[84] ***Birchfield***, 136 S. Ct. at 2185.
[85] ***Id.*** at 2186 (2016) (emphasis added).
[86] ***Katz v. United States***, 88 S. Ct. 507, 514 (1967); ***Schneckloth v. Bustamonte***, 93 S. Ct. 2041, 2058 (1973).

any duress or coercion, actual or implied.[87] The prosecution bears the high burden of proving actual and voluntary consent by clear and convincing evidence.[88]

The Supreme Court stated in ***Bumper v. North Carolina*** that the State's burden of proving consent by clear and convincing evidence, "cannot be discharged by showing no more than acquiescence to a claim of lawful authority."[89]

The "claim of lawful authority" referred to in ***Bumper*** does not need to involve mention of a search warrant. "It is enough, for example, that the police incorrectly assert that they have a right to make a warrantless search under the then existing circumstances."[90]

Further, when analyzing whether consent was voluntary, the Wisconsin Court of Appeals has stated, "Courts use two steps in reviewing a determination of voluntariness of consent to a search: whether there was consent, and whether it was voluntarily given."[91] The Wisconsin Court of Appeals also found that the State bears the burden of proving by clear and positive evidence the search was the result of a

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[87] ***State v. Padley***, 2014 WI App 65, ¶ 64, 354 Wis. 2d 545, 849 N.W.2d 867 (Emphasis and numeration added).
[88] ***State v. Stankus***, 220 Wis. 2d 232, 237–38, 582 N.W.2d 468 (Ct. App. 1998).
[89] ***Bumper v. North Carolina,*** 88 S. Ct. 1788, 1792 (1968).
[90] LaFave, *supra,* at § 8.2(a) n.35 (citing, *inter alia*, ***Orhorhaghe v. I.N.S.***, 38 F.3d 488 (9th Cir. 1994) (defendant's consent to search of his apartment not valid given agent's false "*statement at the doorway that the agents did not need a warrant*") (emphasis added); ***United States v. Molt***, 589 F.2d 1247 (3d Cir. 1978) (defendant's consent not valid where agents innocently but falsely told defendant federal statute authorized them to make warrantless inspection of defendant's business records); ***State v. Casal***, 410 So. 2d 152 (Fla. 1982) (consent to search of boat invalid where Deputy falsely asserted no warrant necessary); ***Cooper v. State***, 277 Ga. 282, 587 S.E.2d 605 (2003) (false statement by police to defendant that law requires him to submit to search even absent a warrant invalidates subsequent consent). *See also*: ***Orhorhaghe***, 38 F.3d at 500, ("It is well established that there can be no effective consent to a search or seizure if that consent follows a law enforcement Deputy's assertion of an independent right to engage in such conduct.")
[91] ***Padley***, 354 Wis. 2d 545, ¶ 63.

free, intelligent, unequivocal, and specific consent without any duress or coercion, actual or implied.[92]

The Supreme Court reversed and remanded the case in ***Beylund*** to determine whether the state could show voluntariness of consent in the totality of the circumstances, given that the officer's statement was incorrect and intimidated ***Beylund*** into thinking he did not have a right to refuse.[93]

Though this case does not present a question of voluntary consent, the reasoning of the appellate courts applies to Mr. Anker's case. Here, the State was unable to prove the advisals were lawful because the ITAF unlawfully informed Mr. Anker that he would face refusal penalties if he did not submit. In ***State v. Dalton***, the Court found the petitioner was criminally punished for exercising his constitutional right to refuse a blood test.[94] The Court noted that established caselaw prohibited such punishment for the exercise of a constitutionally protected right.[95]

The Wisconsin Supreme Court noted:

> As to the State's first argument, the fact that refusal is not a stand-alone crime does not alter our analysis. This is not a distinction the Birchfield Court drew. Although Birchfield states that "motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense[,]" it also addresses the wider impermissibility of criminal penalties for refusal, not only criminal charges. See *Birchfield*, 136 S. Ct. at 2185-86. (emphasis added).[96]

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[92] ***Id***. ¶ 64.
[93] ***Birchfield***, 136 S. Ct. at 2186.
[94] ***State v. Dalton***, 2018 WI 85, ¶ 59, 383 Wis. 2d 147, 914 N.W.2d 120.
[95] ***Id.***; *See also*: ***Harman v. Forssenius***, 85 S. Ct. 1177, 1185 (1965); ***Buckner v. State***, 56 Wis. 2d 539, 550, 202 N.W.2d 406 (1972) (explaining that "[a] defendant cannot receive a harsher sentence solely because he availed himself of one of his constitutional rights."); *see also* ***Kubart v. State***, 70 Wis. 2d 94, 97, 233 N.W.2d 404 (1975) ("A defendant cannot receive a harsher sentence solely because he has availed himself of the important constitutional right of trial by jury.").
[96] ***State v. Dalton*****,** 2018 WI 85, ¶ 63, 383 Wis. 2d 147, 914 N.W.2d 120.

Similarly, in ***State v. Blackman***, the Wisconsin Supreme Court had to decide if consent was freely and voluntarily given since the consequences for refusal were misrepresented to Blackman by the ITAF.[97] The Court concluded his consent was involuntary in such a circumstance because the consent was a product of misrepresentation.[98] The State could not meet its burden of proving the advisals are lawful; thus, any refusal to submit to that test which would not be the product of voluntary consent would be reasonable under the Fourth Amendment. Here, as the State cannot prove the officer's advisals were lawful, Mr. Anker's refusal to submit to the blood test was also reasonable under the Fourth Amendment. As in ***Blackman***, no evidence derived from the incorrect advisals may be used in a subsequent criminal prosecution.

In ***Camara v. Municipal Court of City and County of San Francisco***, the United States Supreme Court held that an ordinance criminalizing an individual's refusal to consent to a warrantless search was unconstitutional.[99] The case involved a property owner who refused to consent to an inspection of his property without a warrant to search. The law at issue punished those who refused to permit such an inspection by criminalizing those refusals and permitting fines and jail terms for noncompliance.

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[97] ***State v. Blackman***, 2017 WI 77, 377 Wis. 2d 339, 898 N.W.2d 774.
[98] ***Blackman***, 2017 WI 77, ¶ 151.
[99] ***Camara v. Municipal Court of City and County of San Francisco***, 87 S. Ct. 1727, 1737 (1967).

Counsel objected to the admission of refusal evidence on Fourth Amendment grounds. While caselaw previously permitted such evidence under the Fifth Amendment,[100] ***Birchfield*** and ***Dalton*** establish that no such evidence may be elicited without violating the Fourth Amendment to the United States Constitution.[101]

A blood test is a search under ***Schmerber***.[102] There is a constitutional right to refuse consent to such a search.[103] It is a due process violation to comment on the exercise of a constitutional right. Thus, commenting on the invocation of the right to decline a warrantless blood test and using that invocation at trial to show consciousness of guilt violates due process. [104]

In ***State v. Banks***, the Wisconsin Court of Appeals found that trial counsel was ineffective for permitting the State to allow evidence of the refusal to submit to a DNA test. "Accordingly, when the State introduced testimony regarding Banks' refusal to voluntarily submit a DNA sample, Banks' attorney should have challenged the evidence. When the State commented on Banks' refusal during closing, suggesting his refusal demonstrated consciousness of guilt, Banks' attorney should have objected."[105]

The ***Banks*** Court further held:

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[100] *See, e.g.,* ***South Dakota v. Neville***, 459 U.S. 553 (1983).
[101] ***Birchfield v. North Dakota***, 136 S. Ct. 2173, 2185 (2016); ***State v. Dalton*****,** 2018 WI 85, ¶ 59, 383 Wis. 2d 147, 914 N.W.2d 120.
[102] ***Schmerber v. California***, 86 S. Ct. 1826, 1834 (1966).
[103] ***Dalton***, 2018 WI 85, ¶ 59.
[104] ***State v. Banks***, 2010 WI App 107, 328 Wis. 2d 766, 790 N.W.2d 526.
[105] ***Id.*** ¶ 25.

> [I]t is a violation of the defendant's right to due process for a prosecutor to comment on a defendant's failure to consent to a warrantless search . . . It has long been a tenant of federal jurisprudence that a defendant's invocation of a constitutional right cannot be used to imply guilt. [106]

The Court cited to the concurrence in ***Grunewald v. United States***, where Justice Black declared:

> I can think of no special circumstances that would justify use of a constitutional privilege to discredit or convict a person who asserts it. The value of constitutional privileges is largely destroyed if persons can be penalized for relying on them. It seems peculiarly incongruous and indefensible for courts which exist and act only under the Constitution to draw inferences of lack of honesty from invocation of a privilege deemed worthy of enshrinement in the Constitution.[107]

Here, as in ***Banks***, it was a violation of Mr. Anker's rights for the prosecutor to solicit testimony on him declining to submit to the blood draw.

D. *State v. Levanduski* does not address the use of a refusal in a subsequent OWI trial.

In ***State v. Levanduski***, the Court of Appeals decided the same issue as Mr. Anker's. However, the decision in ***Levanduski*** does not control here. First, in ***Levanduski***, the Court of Appeals relied upon *Fifth* Amendment caselaw. One such case is ***South Dakota v. Neville***, which addressed the question of whether the refusal to take a test was admissible as consciousness of guilt.[108] The defendant argued that his refusal was protected by the Fifth Amendment and commentary on his refusal

[106] ***Id.*** ¶ 24.
[107] ***Id.*** (citing ***Grunewald v. United States,*** 353 U.S. 391, 425–26 (1957).
[108] ***South Dakota v. Neville***, 459 U.S. 553 (1983).

at trial would thus be unconstitutional.[109] The ***Neville*** Court found that a refusal was not protected by the Fifth Amendment.[110] ***Neville*** also addressed, and denied, a Fifth Amendment due process claim.[111] It did not address the Fourth Amendment.

The cases cited by the Court of Appeals in ***Levanduski*** fall into a noticeable pattern—they do not address the Fourth Amendment. ***State v. Bolstad***, in 1985, dealt with a due process claim in presenting the defendant's explanation for why he refused a blood test.[112] ***State v. Crandall***, in 1986, dealt with a due process claim under the Wisconsin Constitution.[113] ***State v. Zielke***, in 1999, also dealt with a due process claim.[114]

In addition, the Court of Appeals relied upon language from ***Birchfield*** and ***Dalton*** to support its conclusions that "imposing civil penalties and evidentiary consequences on drunk-driving suspects who refuse to submit to a blood draw is lawful under the Fourth Amendment, but imposing criminal penalties for a refusal is not."[115] In ***Birchfield***, the Supreme Court actually considered the case of petitioner Beylund, who submitted to a blood test and was then subject to administrative penalties.[116] Therefore, the Court in ***Birchfield*** actually considered whether "imposing civil penalties" in a drunk driving case could be lawful under

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[109] ***Id.*** at 556.
[110] ***Id.*** at 564.
[111] ***Id.*** at 566.
[112] ***State v. Bolstad***, 124 Wis. 2d 576, 582 (1985).
[113] ***State v. Crandall***, 133 Wis. 2d 251, 252–53 (1986). ***Crandall*** also involved a refusal to submit to a breath test, which does not present the same privacy considerations under ***Birchfield***.
[114] ***State v. Zielke***, 137 Wis. 2d 39 (1987).
[115] ***Levanduski***, 20 WI App 53, 393 Wis. 2d 674, 948 N.W.2d 411.
[116] ***Birchfield***, 136 S. Ct. at 2186.

the Fourth Amendment. The ***Birchfield*** Court reversed the trial court's order that civil penalties for refusing a blood test could be administered, ultimately remanding back to the trial court to determine that question.[117]

In circuit court, the State cited to ***Birchfield*** to support its argument that "[T]he United States Supreme Court has in the past approved the imposition of evidentiary consequences, the fact that a refusal could be used against somebody and nothing in ***Birchfield*** should be read to cast doubt on these prior rulings."[118] The relevant portion of ***Birchfield*** states: "Our 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."[119] That portion of ***Birchfield*** is dicta, and the issue of the constitutionality of implied consent laws was not ripe. As the Supreme Court noted, neither side raised the claim.[120] The real issue in ***Birchfield*** was whether refusing to submit to blood testing was a constitutionally protected right—which is what Mr. Anker asks this Court to examine.

Dalton took this one step farther. The fact that the ***Birchfield*** Court considered criminalized refusals (i.e., criminal charges arising from a refusal to submit to chemical testing) did not alter the Wisconsin Supreme Court's analysis as it related to the administrative penalties for refusing testing in Wisconsin: "Although

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[117] ***Id.***
[118] R.68 at 18.
[119] ***Birchfield***, 136 S. Ct. at 2185.
[120] ***Id.***

Birchfield states that motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense [,] it also addresses the wider impermissibility of criminal penalties for refusal, not only criminal charges."[121] The ***Dalton*** Court concluded an arrestee has a constitutional right to refuse a warrantless blood test; increasing his sentence based upon the exercise of his constitutional right violated the Fourth Amendment.[122]

The ***Levanduski*** Court held that civil penalties and evidentiary consequences are separate from criminal penalties, noting in Footnote Fivethat the petitioner in ***Dalton*** could not face a criminal penalty, as Wisconsin does not criminalize refusals, and evidentiary consequences in an OWI trial are permissible under the Fifth Amendment caselaw noted above.[123]

The ***Levanduski*** Court in its decision stops the analysis there. The Court does not consider the scenario in which the defendant in ***Dalton*** found himself: where the refusal to submit to blood testing was used to dole out a harsher jail sentence. That situation would constitute a criminal penalty and was precisely why the Court in ***Dalton*** held that the defendant's rights were violated when the sentencing court imposed a harsher sentence for refusing to submit to a blood test.[124] Nor does the Court consider that "evidentiary consequences" can mean the use of refusal to submit to blood testing in a refusal hearing under Wis. Stat. § 343.305(9)(a)4.

[121] ***Dalton***, 383 Wis. 2d 147, ¶ 63 (internal quotation and citation omitted).
[122] ***Id.*** ¶ 67.
[123] ***Levanduski***, 20 WI App 53.
[124] ***Dalton***, 383 Wis. 2d 147, ¶ 67.

Therefore, there is no support in ***Levanduski*** for the argument that Wisconsin caselaw upholds what the circuit court did here: use the refusal to submit to the blood test in Mr. Anker's OWI trial. Had the court barred the State from presenting evidence of Mr. Anker's declining to submit to the blood test, the jury would have acquitted him of both charged offenses.

III. THE CIRCUIT COURT ERRED IN DETERMINING THE REFUSAL COULD BE USED AT TRIAL WITHOUT CONDUCTING A REFUSAL HEARING.

A. Standard of Review

An appellate court reviews *de novo* a circuit court's legal conclusions.[125] An appellate court reviews a circuit court's findings based on clearly erroneous review.[126]

B. The court failed to perform a meaningful review of the alleged refusal.

Before trial, the court stated it "has already found the refusal by conduct occurred. That was the decision and that was based on the hearing that was issued on August 20th of 2019."[127] Yet the court's written decision, issued on August 20, 2019, referenced the two defense motions, filed on March 15, 2019. The defense

[125] ***Guzman***, 166 Wis. 2d at 586.
[126] ***State v. Johnson***, 2007 WI 32, ¶ 13, 299 Wis. 2d 675, 729 N.W.2d 182.
[127] R.68 at 15. The court referred to its written decision, as no hearing occurred on August 20, 2019.

motions were a challenge to Mr. Anker's detention for field sobriety testing and a motion to dismiss the refusal case (assigned a separate case number) under ***State v. Baratka***. The court therefore reviewed the refusal in the narrow context of whether the refusal could be upheld under ***Baratka*** when Mr. Anker requested an attorney when Officer Anderson asked whether he would submit to the blood test. The court did not examine the remaining issues a court may address in a refusal hearing, including whether probable cause existed to believe the individual was operating while under the influence or whether the officer complied with his duties under Wis. Stat. 343.305(4).[128] Nor did the court determine whether a refusal revocation should ensue.

Moreover, at the May 10, 2019 motion hearing on the two above-mentioned motions, the court allowed testimony regarding the refusal. However, the testimony was limited to establishing whether Officer Anderson read the Informing the Accused, whether Officer Anderson ever informed Mr. Anker he did not have the right to consult with an attorney during the Informing the Accused reading, and whether Mr. Anker received the Notice of Intent to Revoke Operating Privileges.[129] There was no testimony regarding the other issues under Wis. Stat. 343.305(9)(a)5.a because the hearing was not a refusal hearing.

Other evidence also demonstrates no refusal hearing occurred in this case. The Court may take judicial note that the refusal case, Columbia County Circuit

[128] Wis. Stat. 343.305(9)(a)5.a.
[129] R.67 at 24.

Court case 2018 TR 6069R, remains open. Consequently, the court allowing the refusal to submit to blood testing to be used in the criminal trial violated Mr. Anker's right to due process. This included testimony by Officer Anderson, as well as Court instructing the jury on using Mr. Anker's declination to submit to a blood test as relevant evidence for deliberations.

C. *State v. Donner* does not bar Mr. Anker from the relief he seeks.

The State cited to ***State v. Donner*** in arguing that no formal refusal hearing must occur before the refusal could be used in the OWI trial.[130] Yet ***State v. Donner*** does not control here, for several reasons. First, ***Donner*** was issued before ***State v. Dalton*** and ***North Dakota v. Birchfield***.[131] The Wisconsin Supreme Court and United States Supreme Court held that blood tests are an intrusion into an individual's Fourth Amendment right to be free from unreasonable searches. Thus, there must be a meaningful review of whether an individual consented or did not consent to a blood test before a refusal to submit to a blood test may be used in an OWI trial to denote consciousness of guilt. The ***Birchfield*** Court also cautions there must be a limit to evidentiary consequences (through implied consent laws) of refusing a blood test in an OWI context: "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."[132]

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[130] R.68 at 16.
[131] ***Dalton***, 2018 WI 85 ¶ 63; ***Birchfield***, 135 S. Ct. at 2185.
[132] ***Birchfield***, 135 S. Ct. at 2185.

In addition, ***Donner*** supports the proposition that Mr. Anker must receive the equivalent of a formal hearing on the refusal. In ***Donner***, the Court held that there must be an "equivalent of an implied consent hearing" before evidence of a refusal could be used against a defendant.[133] Here, there was no equivalent of a refusal hearing. The issue of probable cause was not addressed by the circuit court. Had Mr. Anker received a refusal hearing (or its equivalent), he would have argued no probable cause existed to arrest him. He would have also argued that the officer did not properly advise him under the implied consent law. Under ***Birchfield*** and ***Dalton***, the State could not introduce evidence of declining to submit to a blood test as consciousness of guilt. Had the court barred the State from presenting evidence of Mr. Anker's declining to submit to the blood test, the jury would have acquitted him of both charged offenses.

[133] ***State v. Donner***, 192 Wis. 2d 305, 314, 531 N.W.2d 369 (Ct. App. 1995).

CONCLUSION

For the reasons stated above, Mr. Anker respectfully requests that this Court reverse the circuit court's orders denying his two suppression motions and permitting the jury to consider the refusal to submit to the warrantless blood draw as consciousness of guilt. He asks this Court to remand the matter for further proceedings.

Dated at Madison, Wisconsin, November 2, 2020.

Respectfully submitted,

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APPENDIX