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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.

REPLY 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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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ARGUMENT

I. ANKER'S DETENTION FOR FIELD SOBRIETY TESTING WAS WITHOUT REASONABLE SUSPICION.

A. The State has not pointed to facts indicating Anker operated while impaired.

The State does not adequately address the finding made by the court that 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[.]"[1] The officer did not testify that he believed Anker was dishonest. Nor did he testify that the disclosure of one beer consumed and the odor were significant in a decision to detain an individual for field sobriety testing. The State is correct—the standard for reasonable suspicion is objective.[2] But Anderson never testified that these were inferences he made in his investigations. Anderson never testified that an admission of having one beer was inconsistent or improbable in an OWI investigation when the individual exhibits an odor of intoxicants. Had this been a contradiction or significant, the officer would have testified so. The State further does not cite to any caselaw distinguishing such apparent contradictions as significant. The court's finding was speculation. This factor may be discounted.

Anker drove his vehicle after consuming alcohol. There was insufficient information to conclude he operated while impaired. There was no swerving,

[1] R.67 at 32.
[2] State's Brief at 9.

difficulty understanding the officer, or dexterity issues. While there was an odor of alcohol and bloodshot eyes, an odor indicates someone was drinking—not that he was impaired. The officer testified that bloodshot eyes have multiple causes.[3] The State is correct that Anderson did not need to find an innocent explanation for the eyes but there was no testimony about the significance of bloodshot eyes.[4]

The State also noted that Anderson ran Anker's driving record and discovered he had two prior OWI convictions.[5] The State noted the convictions may be considered in the analysis.[6] The State cited to ***State v. Lange*** and ***State v. Goss***, two cases addressing the probable cause to arrest standard.[7] But in ***Goss***, the Court reviewed prior convictions in the context of the low prohibited alcohol threshold for those with three prior OWI convictions.[8] In ***State v. Lange***, the Court held that a conviction "could be taken into account" in a probable cause decision.[9] The State fails to note the distinguishing fact from ***Lange***: the "wildly dangerous driving."[10] Neither ***Lange*** nor ***Goss*** instruct that every detention for field sobriety testing is supported when the individual has OWI convictions.

The Court in ***County of Sauk v. Leon*** noted that "When an officer is not aware of bad driving, then other factors suggesting impairment must be more

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[3] R.67 at 17.
[4] *Id.* at 8.
[5] State's Brief at 10.
[6] *Id.*
[7] ***State v. Goss***, 2011 WI 104, ¶ 24, 338 Wis. 2d 72, 806 N.W.2d 918; ***State v. Lange***, 2009 WI 49, ¶ 33, 317 Wis. 2d 383, 766 N.W.2d 551.
[8] ***Goss***, 2011 WI 104, ¶ 24.
[9] ***Lange***, 2009 WI 49, ¶ 33.
[10] ***Id.*** ¶ 24.

substantial."[11] Here, "the record is simply devoid of facts from which reasonable inferences could be drawn that [Anker]" was impaired.[12] The State does not address the ***Leon*** case other than to note it is different.[13] The Court is under no obligation to construct an argument for the State.[14]

For those reasons, the denial of the motion must be reversed.

II. THE CIRCUIT COURT INCORRECTLY DENIED ANKER'S MOTION TO PROHIBIT REFERENCE TO REFUSING AND ERRONEOUSLY ALLOWED THE STATE TO ELICIT TESTIMONY ON REFUSING.

A. An individual has a right to be free from unreasonable searches and seizures.

The State concedes that the Fourth Amendment to the United States Constitution protects Anker from unreasonable searches and seizures.[15] Anker assumes the State agrees that the caselaw cited in the initial brief, including ***Riley v. California***, apply in this context.[16]

[11] ***Cnty. of Sauk v. Leon***, 2011 WI App 1, 330 Wis. 2d 836, 794 N.W.2d 929.
[12] ***Id.*** ¶ 23.
[13] State's Brief at 10.
[14] ***State v. Pettit***, 171 Wid. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (insufficiently developed arguments need not be addressed by an appellate court).
[15] Brief at 11.
[16] ***Riley v. California***, 134 S. Ct. 2473 (2014).

B. The State could not use the refusal at the drunk driving trial.

In ***State v. Dalton***, the Court found the petitioner was criminally punished for exercising his right to refuse a blood test.[17] The Court noted that caselaw prohibited such punishment for the exercise of a protected right.[18]

In ***State v. Blackman***, the Wisconsin Supreme Court concluded consent to a blood test was involuntary due to inaccurate information in the Informing the Accused.[19] As in ***Blackman***, no evidence derived from the incorrect advisals may be used in a subsequent criminal prosecution.

Counsel objected to the admission of refusal evidence on Fourth Amendment grounds.[20] While caselaw permitted such evidence under the Fifth Amendment,[21] ***Birchfield*** and ***Dalton*** establish that no such evidence may be elicited without violating the Fourth Amendment to the United States Constitution.[22]

A blood test is a search under ***Schmerber***.[23] There is a constitutional right to refuse consent to such a search under the Fourth Amendment.[24] It is a due process violation to comment on the exercise of a constitutional right. Commenting on the

[17] ***State v. Dalton***, 2018 WI 85, ¶ 59, 383 Wis. 2d 147, 914 N.W.2d 120.
[18] ***Id.***
[19] ***State v. Blackman***, 2017 WI 77, ¶ 151, 377 Wis. 2d 339, 898 N.W.2d 774.
[20] R.68 at 19; R.68 at 314.
[21] *See, e.g.,* ***South Dakota v. Neville***, 459 U.S. 553 (1983).
[22] ***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.
[23] ***Schmerber v. California***, 86 S. Ct. 1826, 1834 (1966).
[24] ***Dalton***, 2018 WI 85, ¶ 59.

invocation of the right to decline a warrantless blood test and using that invocation at trial to show consciousness of guilt violates due process.[25]

In ***State v. Banks***, the Wisconsin Court of Appeals noted that:

> [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. [26]

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

C. *State v. Levanduski* does not address the use of a blood refusal in an OWI trial.

The decision in ***Levanduski*** does not control here. In ***Levanduski***, the Court of Appeals relied upon *Fifth* Amendment caselaw. One case is ***South Dakota v. Neville***, which addressed the question of whether the refusal to take a test was admissible as consciousness of guilt.[27] The defendant argued that his refusal was protected by the Fifth Amendment and commentary on his refusal at trial would thus be unconstitutional.[28] The ***Neville*** Court found that a refusal was not protected by the Fifth Amendment.[29] ***Neville*** also addressed, and denied, a Fifth Amendment due process claim.[30] It did not address the Fourth Amendment.

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[25] ***State v. Banks***, 2010 WI App 107, 328 Wis. 2d 766, 790 N.W.2d 526.
[26] ***Id.*** ¶ 24.
[27] ***South Dakota v. Neville***, 459 U.S. 553 (1983).
[28] ***Id.*** at 556.
[29] ***Id.*** at 564.
[30] ***Id.*** at 566.

Another case is ***State v. Bolstad***, which dealt with a due process claim in presenting the defendant's explanation for why he refused a blood test.[31] ***State v. Crandall*** dealt with a due process claim under the Wisconsin Constitution.[32] ***State v. Zielke***, also dealt with a due process claim.[33] The State does not respond to this argument about Fourth versus Fifth Amendment caselaw.[34] Further, as Fifth Amendment caselaw, the cases are not relevant to this issue. Anker presents an issue of first impression.

In addition, the Court 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."[35] In ***Birchfield***, the Supreme Court considered the case of petitioner Beylund, who submitted to a blood test and was subjected to administrative penalties.[36] The Court in ***Birchfield*** considered whether "imposing civil penalties" in a drunk driving case could be lawful under the Fourth Amendment and found in favor of the appellant. The ***Birchfield*** Court reversed the order that administrative penalties for refusing a

[31] ***State v. Bolstad***, 124 Wis. 2d 576, 582 (1985).
[32] ***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***.
[33] ***State v. Zielke***, 137 Wis. 2d 39 (1987).
[34] State's Brief at 12.
[35] ***State v. Levanduski***, 2020 WI App 53, 393 Wis. 2d 674, 948 N.W.2d 411.
[36] ***Birchfield***, 136 S. Ct. at 2186.

blood test could issue, remanding back to the trial court to determine that question in the context of the consent analysis.[37]

The State argues ***Birchfield*** supports its position without examining ***Birchfield***.[38] In particular, the State relies upon dicta from the case: "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."[39] Also, the issue of the constitutionality of implied consent laws was not ripe. As the Court noted, neither side raised the claim.[40] The issue in ***Birchfield*** was whether refusing to submit to blood testing was a constitutionally protected right—which is what Anker asks this Court to examine.

In ***Dalton*** 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 *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."[41] In other words, the Court found that increasing a penalty due to a blood refusal, even a civil penalty, is not permissible. The ***Dalton*** Court concluded an arrestee has a constitutional right to

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[37] ***Id.***
[38] State's Brief at 12.
[39] ***Birchfield***, 136 S. Ct. at 2185.
[40] ***Id.***
[41] ***Dalton***, 383 Wis. 2d 147, ¶ 63 (internal quotation and citation omitted).

refuse a warrantless blood test; increasing his sentence based upon the exercise of his constitutional right violated the Fourth Amendment.[42] The ***Dalton*** Court proscribed exactly what the trial court did here—use a refusal to blood testing in a criminal trial to enhance the chances of conviction and jail.

The ***Levanduski*** Court held that civil penalties and evidentiary consequences are separate from criminal penalties, noting that 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.[43] The Court did 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. It was 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.[44]

Nor did the ***Levanduski*** 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. In other words, a defendant may receive a refusal revocation and other consequences to a refusal finding. But the law is clear that using an invocation of a right against an individual to put him in jail is impermissible. Therefore, there is no support in ***Levanduski*** that Wisconsin caselaw upholds what

[42] ***Id.*** ¶ 67.
[43] ***Levanduski***, 2020 WI App 53.
[44] ***Dalton***, 383 Wis. 2d 147, ¶ 67.

the circuit court did: use the refusal to submit to the blood test to convict Anker in a criminal trial.

III. THE CIRCUIT COURT ERRED IN DETERMINING THE REFUSAL COULD BE USED AT TRIAL.

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

As stated in the initial brief, 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."[45] The court's written decision referenced the two defense motions. These motions were a challenge to 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 the legal question of whether the refusal could be upheld under ***Baratka*** when Anker requested an attorney after Anderson read the Informing the Accused. 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).[46] Nor did the court determine whether a refusal revocation should ensue.

At the May 10, 2019 motion hearing, the court heard testimony regarding the refusal. The testimony was limited to establishing whether Anderson read the

[45] R.68 at 15.
[46] Wis. Stat. 343.305(9)(a)5.a.

Informing the Accused, whether he informed Anker he did not have the right to consult with an attorney during the Informing the Accused, and whether Anker received the Notice of Intent to Revoke Operating Privileges.[47] There was no testimony regarding the other issues under Wis. Stat. § 343.305(9)(a)5.

Other evidence also demonstrates no refusal hearing occurred. The Court may take judicial note that the refusal case is open.[48] Consequently, the court allowing the refusal to submit to blood testing to be used in the trial violated Mr. Anker's right to due process. This included testimony by Anderson, and the Court instructing the jury on using Anker's declination to submit to a blood test as relevant evidence.

B. *State v. Donner* applies but is not on point.

State v. Donner does not control here. First, ***Donner*** was issued before ***State v. Dalton*** and ***North Dakota v. Birchfield***.[49] The Wisconsin Supreme Court and United States Supreme Court held that blood tests are an intrusion into a Fourth Amendment right to be free from unreasonable searches.[50] Thus, there must be a meaningful review of whether an individual consented or did not consent to a blood

[47] R.67 at 24.
[48] The State argues that the Court may not take judicial notice of this fact, as the Court "should not rely on facts outside of the record before it." State's Brief at 15. It is unclear how a separate case could be part of the record in this appeal. The State fails to address this point.
[49] ***Dalton***, 2018 WI 85 ¶ 63; ***Birchfield***, 135 S. Ct. at 2185.
[50] ***Skinner v. Ry. Labor Executives' Ass'n***, 489 U.S. 602, 616 (1989); ***Birchfield v. North Dakota***, 136 S. Ct. 2173 (2016).

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 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."[51] ***Birchfield***'s caution applies to the analysis because the use of a refusal to blood testing in a criminal trial is a consequence of the implied consent law under Wis. Stat. § 343.305. The ***Birchfield*** Court indicated that more scrutiny is required in a scenario like that here, where the State introduces evidence of a blood test refusal in a criminal OWI trial. Such an argument necessarily follows the rationale of the Supreme Court and the Wisconsin Supreme Court in ***Dalton***, as noted in Anker's initial brief and above.

Donner supports the proposition that 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.[52] The State argues that ***Donner*** supports its position that the limited reviewAnker received constituted a refusal hearing.[53] The Court in ***Donner*** noted that the limited hearing received by the appellant may have been different had "Donner raise[d] [an] appellate claim that he was not properly advised

[51] ***Birchfield***, 135 S. Ct. at 2185.
[52] ***State v. Donner***, 192 Wis. 2d 305, 314, 531 N.W.2d 369 (Ct. App. 1995).
[53] State's Brief at 16.

under the implied consent law."[54] This is a claim Anker would have alleged in a refusal hearing—that he was not properly advised that his refusal would have been used in at trial. Accordingly, the holding in ***Donner*** is distinguishable.

There was no equivalent of a refusal hearing. The issue of probable cause was not addressed. Had Anker received a refusal hearing (or its equivalent), he would have argued no probable cause existed to arrest him and would have been entitled to present evidence as to that argument. It makes no difference that there was no stand-alone probable cause motion filed.[55] Probable cause is an issue the Court reviews in a refusal hearing under Wis. Stat. § 343.305(9)(a)5.a. No motion need be filed because it is the State's burden of proof at such a hearing. Anker would have also argued that the officer did not properly advise him under the implied consent law.

[54] ***Donner***, 192 Wis. 2d 305, 313, 531 N.W.2d 369.
[55] State's Brief at 16.

CONCLUSION

Anker requests that this Court reverse the circuit court's orders denying his two motions and permitting the jury to consider the refusal to submit to the blood draw as consciousness of guilt.

Dated at Madison, Wisconsin, January 13, 2021.

Respectfully submitted,

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APPENDIX