STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III
CASE NO. 2020AP001895

COUNTY OF DUNN,

Plaintiff-Respondent,

v.

KEVIN J. CORMICAN,

Defendant-Appellant.

**ON APPEAL FROM THE JUDGMENT OF CONVICTION,
ENTERED IN THE CIRCUIT COURT FOR DUNN COUNTY,
CASE NOS. 19 TR 2939 AND 19 TR 4074,
THE HONORABLE JAMES M. PETERSON, PRESIDING**

DEFENDANT-APPELLANT'S REPLY BRIEF

ADAM P. NERO
State Bar No. 1097720

ROBERT PAUL MAXEY
State Bar No. 1112746

NELSON DEFENSE GROUP
811 First Street, Ste. 101
Hudson, WI 54016
(715) 386-2694
adam@nelsondefensegroup.com
robert@nelsondefensegroup.com

Attorneys for the Defendant-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

Cases

Statutes

Constitutional Provisions

ARGUMENT

This Court should reverse the order of the circuit court denying Mr. Cormican's suppression motion, vacate his conviction, and remand for further proceedings for three reasons. First, the County's argument that "the [revocation] process is automatic" is a misstatement of law. Second, Deputy Pollock's claim that Mr. Cormican had already given his consent to the chemical test by virtue of getting his Wisconsin driver's license is misleading in view of the Wisconsin case law and United States Supreme Court precedent. Finally, neither Deputy Pollocks subjective intent nor his personal opinions are relevant to the factual determination as to whether Mr. Cormican's consent was the product of an essentially free and unconstrained choice.

I. THE COUNTY'S ARGUMENT THAT THE REVOCATION PROCESS IS AUTOMATIC IS A MISSTATEMENT OF LAW.

After reading the information from the Informing the Accused Form ("ITAF"), Deputy Pollock informed Mr. Cormican that if Mr. Cormican refused the implied consent test, then the state would *automatically* take away his driving privileges. (R. 57 at 18:23–19:3; DVD of traffic stop at 01:09:39–01:09:46.) The County erroneously contends that the ITAF provides that "the [revocation] process is automatic," and as such, Deputy Pollock's statement is not misleading but rather "an accurate recitation of what the [ITAF] provides." (Brief of Plaintiff-Respondent at 5.) This argument is a misstatement of law.

In fact, the ITAF provides only that the accused's "operating privilege will be revoked"; the form does not provide that the accused's operating privilege will be revoked *automatically* without due process as Deputy Pollock represented to Mr. Cormican. (R. 30.) The County concedes that the ITAF only provides: "Your operating privilege will be revoked…." (Brief of Plaintiff-Respondent at 5.)

This is because revocation of a driver's license is an action which requires the state to provide due process. ***Bell v. Burson***, 402 U.S. 535, 539 (U.S. 1971).

Once issued, a driver's license is considered a property interest under the protection of the Due Process Clause. ***State v. Carlson***, 2002 WI App 44, ¶ 11, 250 Wis. 2d 562, 641 N.W.2d 451 (citing ***Bell***, 402 U.S. at 539). Accordingly, because a driver's license is a protected property interest, the Due Process Clause applies to the revocation of a driver's license by the state. *See* ***Bell***, 402 U.S. at 539 ("Suspension of issued licenses … involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment.").

Therefore, while license revocation is a *possible* penalty for refusing to provide a blood sample, it is not the automatic and immediate consequence that Deputy Pollock represented to Mr. Cormican. *Compare* Wis. Stat. § 343.305(7)(a) ("If a person submits [and the result is 0.08 or above] . . . *The person's operating privilege is administratively suspended for 6 months*.") *with* Wis. Stat. § 343.305(10)(a) (requiring a court determination or the passage of 30 days without a hearing request for a refusal-revocation to take effect). Simply put, after the person's license *is suspended*, he can request a hearing, at which the suspension is either rescinded or sustained. But that is not how it works with refusals. The statute does not say, upon refusal, that a person's license *is revoked*. The revocation requires a court determination, or the passage of 30 days without a hearing request, before it ever goes into effect.

The Wisconsin Supreme Court's reading of Wisconsin's implied consent law in ***In re Refusal of Anagnos***, 2012 WI 64, 341 Wis. 2d 576, 815 N.W.2d 675, further demonstrates that license revocation following a refusal is not the automatic consequence that Deputy Pollock represented to Mr. Cormican:

> If … the person refuses to submit to chemical testing, he is informed of the State's *intent* to immediately revoke his operating privileges. Wis. Stat. § 343.305(9)(a). *The person is also informed that he may request a refusal hearing in court.* Wis. Stat. § 343.305(9)(a)4.

Id. at ¶ 24 (emphasis added.)

Anagnos thus makes clear that a person who refuses to submit to chemical testing is informed that while the government has the *intent* to expeditiously bring about the revocation of his operating privileges, he is nevertheless entitled to a refusal hearing in court before revocation ever goes into effect; he is not informed that his driving privileges will be automatically taken away if he refuses to submit to the evidentiary test. As such, the County's reading of ***Anagnos*** is misleading. (Brief of Plaintiff-Respondent at 5.)

For these reasons, it is clear that the ITAF does not provide that "the [revocation] process is automatic," and therefore Deputy Pollock's statement is misleading as it is not "an accurate recitation of what the [ITAF] provides."

II. DEPUTY POLLOCK'S CLAIM THAT MR. CORMICAN HAD ALREADY GIVEN HIS CONSENT TO THE CHEMICAL TEST BY VIRTUE OF GETTING HIS WISCONSIN DRIVER'S LICENSE IS MISLEADING IN VIEW OF THE WISCONSIN CASE LAW AND UNITED STATES SUPREME COURT PRECEDENT.

After reading the information from the ITAF, Deputy Pollock further informed Mr. Cormican that he had already consented to the chemical test simply by virtue of getting his Wisconsin driver's license. (R. 57 at 20:22–25; DVD of traffic stop at 01:10:25–01:11:13.) The County concedes that Deputy Pollock's statement is "beyond what the statute provides, and therefore meets ***Quelle***'s first prong." (Brief of Plaintiff-Respondent at 6.) The County however erroneously contends that Deputy Pollock's statement "is not misleading under ***Quelle***'s second prong in view of the case law." (Brief of Plaintiff-Respondent at 6.)

The County supports its expansive view of the implied consent statute by pointing to prior Wisconsin case law suggesting consent is given when an individual operates a vehicle on a Wisconsin highway or when an individual applies for a driver's license in Wisconsin. (Brief of Plaintiff-Respondent at 6–7.)

Yet this theory is not supported by Wisconsin case law, nor United States Supreme Court precedent. The Wisconsin Supreme Court recently affirmed the

Court of Appeals' rejection of the notion that Wisconsin drivers give "implied consent" to chemical testing at the time they apply for a license—long before the search requested by an officer is contemplated. 2021 WI 64, ¶¶ 52–53, 960 N.W.2d 869. Specifically, the ***Prado*** court agreed with the Court of Appeals that the consent imputed by Wisconsin's implied consent statute is not "consent" in the constitutional sense, and likewise declined to either recognize, or perhaps to establish, a warrant exception specifically for the implied consent law. ***Id***. at ¶¶ 53–54. As such, the Wisconsin Supreme Court made clear in ***Prado*** that the notion that actual consent provided at the scene of an accident or arrest is irrelevant because the driver already gave consent through the act of applying for a license is *not* the law as "[s]uch a conclusion does not take into account the constitutionally significant difference between 'deemed' and actual consent…." ***Id***. at ¶¶ 52–53.

Prior to ***Prado***, this Court explained in ***State v. Padley*** that the implied consent authorized by the plain language of the statute is not the same as the actual and voluntary consent required by the Fourth Amendment:

> There are two consent issues in play when an officer relies on the implied consent law. The first begins with the "implied consent" to a blood draw that all persons accept as a condition of being licensed to drive a vehicle on Wisconsin public road ways. The existence of this "implied consent" does not mean that police may require a driver to submit to a blood draw. Rather, it means that, in situations specified by the legislature, if a driver chooses not to consent to a blood draw (effectively declining to comply with the implied consent law), the driver may be penalized. This penalty scenario for "refusals" created by the implied consent law sets the scene for the second consent issue. The State's power to penalize a refusal via the implied consent law, under circumstances specified by the legislature, gives law enforcement the right to force a driver to make what is for many drivers a difficult choice. The officer offers the following choices: (1) give consent to the blood draw, or (2) refuse the request for a blood draw and suffer the penalty specified in the implied consent law. When this choice is offered under statutorily specified circumstances that pass constitutional muster, choosing the first option is voluntary consent.

2014 WI App 65, ¶¶ 26–27, 354 Wis. 2d 545, 849 N.W.2d 867.

More recently, Wisconsin Supreme Court Justice Kelly explained that the implied consent law is, "part of a mechanism designed to obtain indirectly what it cannot (and does not) create directly—consent to a blood test." ***State v. Brar***, 2017

WI 73, ¶ 56, 376 Wis. 2d 685, 898 N.W.2d 499. The statutory mechanism exists to "cajole drivers into giving … real consent" and "punishes a driver by revoking his operating privileges if he refuses an officer's request for a blood sample." ***Id***.

In another recent case, ***State v. Blackman***, the state argued that ***Padley***'s discussion of voluntary consent was erroneous, and that the defendant had voluntarily consented simply by driving on the highway. 2017 WI 77, ¶ 54, n.20, 377 Wis. 2d 339, 898 N.W.2d 774. The majority in ***Blackman*** acknowledged the state's argument in a footnote and proceeded to thoroughly analyze the voluntariness of the defendant's consent at the time of his conversation with the police, rather than simply deeming the consent to have occurred by virtue of his travelling on the highway. ***Id***. at ¶¶ 54–67. Although a concurring opinion was filed, suggesting that two of the justices might have been sympathetic to the state's argument, the four-justice majority, as well as the one-justice dissent conducted their analyses consistently with the framework set forth in ***Padley***. ***Id***. at ¶¶ 54–67, 89 (Ziegler, J., concurring).

The United States Supreme Court's holdings in ***Missouri v. McNeely,*** 569 U.S. 141, 156 (2013)—that the reasonableness of a warrantless blood test of a drunk-driving suspect must be determined case by case based on the totality of the circumstances—and ***Birchfield v. North Dakota***, 136 S. Ct. 2160, 2185 (2016)—that warrantless blood tests based on the search incident to arrest exception violate the Fourth Amendment—further spurned interpretations of Wisconsin's implied consent statute that predated ***Padley*** and which suggested or stated that a driver consents to testing of his or her blood by either driving on Wisconsin roads or by obtaining a driver's license, *see, e.g.*, ***Scales v. State***, 64 Wis. 2d 485, 494, 219 N.W.2d 286 (1974) (implied consent law "requires that a licensed driver, by applying for an[d] receiving a license, consents to submit to chemical tests for intoxication under statutorily determined circumstances"); ***State v. Neitzel***, 95 Wis. 2d 191, 201, 289 N.W.2d 828 (1980) (a driver has no right to consult with an attorney before determining whether to take or refuse an intoxication test under §

343.305); ***State v. Wintlend***, 2002 WI App 314, ¶12, 258 Wis. 2d 875, 655 N.W.2d 745 (penalties for refusal do not constitute coercion to invalidate consent under the Fourth Amendment).

The change in the United States Supreme Court's approach to warrantless breath and blood tests on drunk-driving suspects as manifested in ***McNeely*** and ***Birchfield*** gave rise to several challenges in Wisconsin that reached the Wisconsin Supreme Court. First, in ***State v. Howes***, this Court certified to the Wisconsin Supreme Court the constitutionality of whether availing oneself of the roads of Wisconsin constitutes actual consent under the Fourth Amendment. 2017 WI 18, ¶¶ 15–16, 373 Wis. 2d 468, 893 N.W.2d 812. The ***Howes*** court ultimately upheld the search at issue in that case in a split decision. Nevertheless, the court issued no majority opinion declaring any law with regard to whether implied consent is constitutionally valid.

Subsequent to ***Howes***, this Court again certified to the Wisconsin Supreme Court a case raising the constitutionality of whether consent implied by statute constitutes actual consent sufficient for purposes of the Fourth Amendment, ***State v. Mitchell***, 2018 WI 84, 383 Wis. 2d 192, 914 N.W.2d 151. Again, the Wisconsin Supreme Court did not issue a majority opinion declaring any law with regard to whether implied consent is constitutionally valid. As in ***Howes***, the search at issue in ***Mitchell*** was upheld, but no rationale garnered a majority vote.

Importantly, however, a majority of the Wisconsin Supreme Court[1] rejected the County's position that Wisconsin's implied consent statute operates as actual consent and joined the rationale of this Court's decision in ***Padley***. Specifically, a 4-3 majority of the Wisconsin Supreme Court in ***Mitchell*** adopted the analysis of ***Padley*** and concluded that implied consent is not constitutionally valid. 2018 WI 84 at ¶¶ 67–68 (concurring opinion), ¶¶ 89–112 (dissenting opinion). The ***Padley*** framework was therefore binding Wisconsin precedent that was in effect at the time of Mr. Cormican's traffic stop. As such, Deputy Pollock should have known that the notion that actual consent provided at the scene of an accident or arrest is irrelevant because the driver already gave consent through the act of applying for a license was *not* the law.

The United States Supreme Court ultimately granted *certiorari* in ***Mitchell***. When it did so, the natural expectation was that the Court would resolve whether implied consent is constitutionally valid. However, the resulting opinion did not resolve the question and, like the Wisconsin Supreme Court's opinions on the subject, did not produce a majority opinion. Instead of addressing whether implied consent is constitutionally valid, a four-justice plurality opinion determined that exigent circumstances "almost always" permit a blood draw without a warrant from an unconscious drunk driving suspect. ***Mitchell v. Wisconsin***, 139 S. Ct. 2525, 2531 (2019).

The Wisconsin Supreme Court therefore made clear in ***Prado*** that the United States Supreme Court's decision in ***Mitchell*** did not change the conclusion that the

[1] Mr. Cormican recognizes that the "lead opinion" in ***State v. Mitchell***, 2018 WI 84 at ¶ 60, declared that it overruled ***Padley*** due to rationale conflicting with a pre-***McNeely*** decision by the Wisconsin Court of Appeals in ***Wintlend***, as well as being wrong as a matter of law for reaching the conclusion, "that 'implied consent' is different than 'actual consent,' and that actual consent is given only when a driver affirms his or her previously given implied consent…." However, a three-justice minority of the Wisconsin Supreme Court cannot overrule a decision of a lower court and certainly cannot overrule the majority opinion of the Wisconsin Supreme Court in ***Blackman***, which is in accord with the reasoning of this Court in ***Padley***. 2017 WI 77 at ¶¶ 54–67, 89 (Ziegler, J., concurring). In addition, the United States Supreme Court's decision in ***Birchfield***, 136 S. Ct. at 2186–87, also makes it clear that the operative consent for the Fourth Amendment analysis occurs at the time an officer requests that a suspect provide a blood sample.

consent imputed by Wisconsin's implied consent statute is not "consent" in the constitutional sense. 2021 WI 64 at ¶ 51.

Accordingly, Deputy Pollock's claim that Mr. Cormican had already consented to the chemical test simply by virtue of getting his Wisconsin driver's license is misleading in view of the Wisconsin case law and United States Supreme Court precedent.

III. NEITHER DEPUTY POLLOCK'S SUBJECTIVE INTENT OR PERSONAL OPINIONS ARE RELEVANT TO THE FACTUAL DETERMINATION AS TO WHETHER MR. CORMICAN'S CONSENT WAS THE PRODUCT OF AN ESSENTIALLY FREE AND UNCONSTRAINED CHOICE.

Where the voluntariness of consent to search is at issue, the Fourth Amendment's touchstone is reasonableness, which is measured in *objective* terms by examining the totality of the circumstances. ***State v. Luebeck***, 2006 WI App 87, ¶ 12, 292 Wis. 2d 748, 715 N.W.2d 639. As such, Deputy Pollock's subjective intent is irrelevant.

Likewise, Deputy Pollock's opinion that he "did not pressure [Mr. Cormican] to take the test" is a legal conclusion and therefore is not relevant to the factual determination as to whether Mr. Cormican's consent was the product of an essentially free and unconstrained choice. *See* ***Ohio v. Robinette***, 519 U.S. 33, 40 (1996).

What matters is what Deputy Pollock actually said to Mr. Cormican. Again, after reading Mr. Cormican the ITAF, Deputy Pollock made the misleading claims that a refusal would automatically result in the state taking Mr. Cormican's license away and that Mr. Cormican had already given his consent to the chemical test simply by virtue of getting his Wisconsin driver's license. (R. 57 at 18:23–19:3, 20:22–25; DVD of traffic stop at 01:09:39–01:09:46 and 01:10:25–01:11:13.) Deputy Pollock then strategically contrasted his erroneous claim implying a summary nature of the revocation proceedings with advising Mr. Cormican that if

he consented to the evidentiary test, then "there *may* be some penalties involved from positive test results." (R. 57 at 29:23–1; DVD of traffic stop at 01:09:45–01:09:50) (emphasis added.) Finally, upon receiving Mr. Cormican's consent, Deputy Pollock stated to Mr. Cormican that he believed Mr. Cormican had made the right choice. (R. 57 at 21:11–13; Ex DVD of traffic stop at 01:11:29–01:11:34.)

Based on their exchange, this Court should conclude that Deputy Pollock's clever guidance and misleading claims *objectively* led Mr. Cormican to believe that the deputy was encouraging, persuading, and falsely incentivizing him to consent to a test. These suggestions are an unconstitutional misuse of authority, as Deputy Pollock is not an attorney, yet he chose to provide improper legal advice in order to obtain Mr. Cormican's acquiescence to what would have otherwise been a nonconsensual search. "Subtle suggestions, strategically made, may amount to deception or trickery where the intent is a misrepresentation of authority." ***State v. Giebel***, 2006 WI App 239, ¶ 19, 297 Wis. 2d 446, 724 N.W.2d 402, *abrogated on other grounds by* ***State v. Brar***, 2017 WI 73, 376 Wis. 2d 685, 898 N.W.2d 499.

CONCLUSION

For the foregoing reasons, Mr. Cormican respectfully requests that this Court vacate his conviction, reverse the order of the circuit court denying his suppression motion, and remand for further proceedings.

Dated this 17th day of November, 2021.

Respectfully submitted,

Electronically signed by:

ADAM P. NERO
State Bar No. 1097720

ROBERT PAUL MAXEY
State Bar No. 1112746

NELSON DEFENSE GROUP
811 First Street, Ste. 101
Hudson, WI 54016
(715) 386-2694
adam@nelsondefensegoup.com
robert@nelsondefensegroup.com

Attorneys for the Defendant-Appellant

CERTIFICATION BY ATTORNEY

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm) and (c) for a brief. The length of this brief is 2,999 words.

Dated this 17th day of November, 2021.

Respectfully submitted,

Electronically signed by:

ADAM P. NERO
State Bar No. 1097720

ROBERT PAUL MAXEY
State Bar No. 1112746

NELSON DEFENSE GROUP
811 First Street, Ste. 101
Hudson, WI 54016
(715) 386-2694

adam@nelsondefensegroup.com
robert@nelsondefensegoup.com

Attorneys for the Defendant-Appellant