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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appellate Case No. 2021AP36-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

CHARLES L. NEEVEL,

Defendant-Appellant.

APPEAL FROM A FINAL ORDER ENTERED IN THE CIRCUIT COURT FOR DODGE COUNTY, BRANCH I, THE HONORABLE BRIAN A. PFITZINGER PRESIDING, TRIAL COURT CASE NO. 18-CT-21

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. THE STATE COMPLETELY MISCHARACTERIZES MR. NEEVEL'S ARGUMENT.

In what could best be characterized as a "straw-man" or "red-herring" argument, the State expends a tremendous amount of energy in the initial part of its argument proffering such things as: "no constitutional doubt [has been cast] on Wisconsin's implied consent law"; "blood samples obtained pursuant to a state's implied consent law are constitutionally permissible"; "[implied] consent is [a] well-established exception [to the Fourth Amendment]"; *et al.* State's Response Brief at pp. 9, 4, 7, respectively [hereinafter "SRB"].

Make ***no*** mistake: Mr. Neevel is ***not*** challenging the constitutionality of implied consent laws themselves. Rather, he is asserting that such cases as *Schmerber v. California*, 384 U.S. 757 (1966), and *Birchfield v. North Dakota*, 579 U.S. ____, 136 S. Ct. 2160, 195 L. Ed. 2d 560 (2016), have raised reasonable questions regarding how implied consent law ought to be ***implemented***.

In other words, Mr. Neevel concedes that which the State assumes he does not, to wit: implied consent laws are constitutional. The question he raises for this Court's consideration, however, is what actions undertaken by the State under the auspices of such laws are constitutionally reasonable? This is the same question impliedly[1] asked by the United States Supreme Court in *Schmerber* when it

[1]To be clear, Mr. Neevel recognizes that the issue addressed in *Schmerber* can only be "implicitly" extended to the enforcement of implied consent laws because, of course, the *Schmerber* Court was not facing a question solely related to implied consent itself, but rather, was examining a question related to a different exception to the Fourth Amendment, namely the exigent circumstances exception. *Schmerber*, 384 U.S. at 770-71. This should not be taken to mean, however, that the notion of what is "reasonable" under the Fourth Amendment when the government seeks evidence of impairment in a drunk driving case where less intrusive means of testing are available is not relevant across *all* forms of gathering evidence, whether they be by implied consent, exigent circumstances, warrant, search incident to arrest, *etc*.

observed that the seizure at issue therein was permissible *under the circumstances* of that case and then noted that it "need not decide whether such wishes [as the accused preferring a less-intrusive means of testing] would have to be respected." *Schmerber*, 384 U.S. at 771. Continuing, the Court stated that the outcome "would be a different case if the police . . . refused to respect a reasonable request to undergo a different form of testing . . . ." *Id.* at 760 n.4.

The bones of the *Schmerber* decision make Mr. Neevel's point regarding what the State seems to either overlook or, alternatively, use as a "red-herring" to divert this Court's attention away from what is truly at issue in this case. Schmerber was not arguing that the exigent circumstances exception to the Fourth Amendment was, in and of itself, a constitutionally unreasonable method by which the State could seek to obtain evidence of a suspect's impairment in an operating while intoxicated prosecution—just as Mr. Neevel is *not* arguing that implied consent laws are unconstitutional. Rather, Schmerber was proffering that the *manner* in which the exigent circumstances exception was *employed* in his case merited constitutional scrutiny—just as Mr. Neevel is arguing that the way in which the implied consent law was executed in his case merits constitutional scrutiny.

As part and parcel of its distracting foray into the constitutionality of implied consent laws, the State overlooks one important aspect of constitutional law: the notion that the government is obligated to employ the *least intrusive means* necessary to obtain the evidence it seeks. The necessity of a search and its extent cannot be determined in a vacuum. It must instead "**be judged in light of the availability of . . . less invasive alternative[s]**." *Birchfield*, 579 U.S. at ___, 136 S. Ct. at 2184. When lesser-intrusive options exist, the state must offer a "satisfactory justification for demanding the more intrusive alternative." *Id.*; *see also*, *Florida v. Royer*, 460 U.S. 491, 500 (1983)("[T]he investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion"). The Supreme Court unequivocally held in *Birchfield* that the availability of a breath test to determine a suspect's blood alcohol content under the search incident to arrest

exception to the Fourth Amendment makes a blood draw for that purpose unreasonable, absent a warrant or exigent circumstances. *Birchfield*, 579 U.S. at ___, 136 S. Ct. at 2184 (the government "offered no satisfactory justification for demanding the more intrusive alternative without a warrant"). If this is truly the case—as the Supreme Court holds that *it is*—then Mr. Neevel merely questions why the same idea should not be extended to the seizure of a sample of his blood under the auspices of an implied consent law when less-intrusive means, such as breath testing, are available? As one can plainly see, this does *not* call into question the constitutionality of the implied consent law itself, but rather, concerns only its *implementation*.

That Mr. Neevel's argument regarding the *implementation* of implied consent laws versus their underlying constitutionality is what is at issue in his case is best gleaned from quoting the *Birchfield* Court's observations at length. More specifically, the *Birchfield* Court stated:

> Having assessed the effect of BAC tests on privacy interests and the need for such tests, we conclude that the Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving. The impact of breath tests on privacy is slight, and the need for BAC testing is great.
>
> We reach a different conclusion with respect to blood tests. 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. Respondents have offered no satisfactory justification for demanding the more intrusive alternative without a warrant.
>
> Neither respondents nor their *amici* dispute the effectiveness of breath tests in measuring BAC. Breath tests have been in common use for many years. Their results are admissible in court and are widely credited by juries, and respondents do not dispute their accuracy or utility.

Birchfield, 579 U.S. at ___, 136 S. Ct. at 2184. A comprehensible, straightforward, and simplified version of Mr. Neevel's argument in this appeal can be made by re-reading the foregoing *Birchfield* quote

and substituting the words "under implied consent laws" for the words "incident to arrests" in the first paragraph.

In so substituting, Mr. Neevel posits that his position is more consistent with Fourth Amendment jurisprudence than is the State's position that under an implied-consent contract, the State may automatically default to the *most* intrusive means by which to gather chemical test evidence.

This brings Mr. Neevel to a related point made by the State, *i.e.*, that a "contract" exists between the individual who seeks to operate a motor vehicle on a public roadway and the state which grants the individual this privilege. SRB at pp. 7-8. Under the terms of this contract, according to the State, the person seeking the operating privilege gives their "implied consent" to providing the government a sample of their blood when they are suspected of operating while intoxicated. Setting aside, only for the moment, the fact that constitutional law *supersedes* contract law, even if one was to examine the question presented by Mr. Neevel solely in terms of the Law of Contract, he would still prevail under the "arms-length transaction" doctrine. *See Flood v. Lomira, Bd. of Review*, 153 Wis. 2d 428, 451 N.W.2d 422 (1990). Under this doctrine, an "arm's-length transaction" is one in which the buyer is *not obligated* to buy what the seller is offering. *Id*. at 436. In the instant case, this is *not* the circumstance if Mr. Neevel is viewed as the "buyer" and the State as the "seller."

The State owns a monopoly. It has sole jurisdiction over the roadways in this state. The buyer, Mr. Neevel, is *forced* to go to this single source if he wishes to drive a motor vehicle on Wisconsin highways. The State, therefore, is in a position to dictate terms to him as he has no authority to negotiate anything differently.[2] Since the issuance of a driver's license is inextricably bound up with Fifth Amendment property rights, he has no option other than to go to the all-powerful state to exercise those property rights. *See*, *e.g.*,

[2]*See, e.g., Van Lare v. Vogt, Inc.*, 2004 WI 110, ¶ 20, 274 Wis. 2d 631, 683 N.W.2d 46 (arm's-length transactions require that both parties have equal bargaining power).

Mackey v. Montrym, 443 U.S. 1 (1979); *Dixon v. Love*, 431 U.S. 105, 112 (1977); *Bell v. Burson*, 402 U.S. 535, 539 (1971).

Once it is understood that the "contract" between Mr. Neevel and the State is not an arms-length transaction, among the remedies the Law of Contract applies in such circumstances is that the terms of the contract must be construed *against* the party with all of the power *in favor of the individual* who lacked it. *See generally*, *Estreen v. Bluhm*, 79 Wis. 2d 142, 155, 255 N.W.2d 473 (1977). Thus, even if this Court ignored entirely the reasonable constitutional questions raised by Mr. Neevel, he would still prevail under the Law of Contract because the issuance of an operating privilege is not an arm's-length transaction, and therefore, he could dictate that the terms of the contract requiring his consent to chemical testing involve the least intrusive means necessary to satisfy that condition.

II. MR. NEEVEL'S CONSENT WAS NOT VOLUNTARY.

The State next turns its attention to the issue of whether Mr. Neevel gave "consent" to a test of his blood, arguing that he did, in fact, give consent, and therefore, has no standing to raise the issue he does. SRB at pp. 10-13. Like its lead argument, this argument too misses the mark.

The State premises its position on the fact that Mr. Neevel gave his "implied consent" to testing when he obtained his operating privilege and did not revoke that consent when he was later read the Informing the Accused form. SRB at pp. 12-13.

The first point made by the State betrays a circuitous logic. That is, the whole issue raised in this appeal is what is constitutionally *reasonable* under the rubric of an implied consent statute. *See* Section I., *supra*. "Reasonableness" is the *sine qua non* of Fourth Amendment jurisprudence. It is among the most fundamental and well settled of all constitutional rules. *See*, *e.g.*, *State v. Boggess*, 115 Wis. 2d 443, 448-49, 340 N.W.2d (1983); *see also Camara v. Municipal Court*, 387 U.S. 523, 528 (1967). To pass constitutional muster under the Fourth Amendment, a seizure must

be reasonable. *See Ohio v. Robinette*, 519 U.S. 33, 39 (1996); *Florida v. Jimeno*, 500 U.S. 248, 250 (1991). Questions arising under the Fourth Amendment "turn[] on considerations of reasonableness . . . ." *State v. Richter*, 2000 WI 58, ¶ 30, 235 Wis. 2d 524, 612 N.W.2d 29; *see also*, *State v. Smith*, 131 Wis. 2d 120, 230, 388 N.W.2d 601 (1986).

It is to the reasonableness standard which all government conduct must ultimately conform. Therefore, to argue that Mr. Neevel impliedly consented to a medico-legal draw of his blood when it is that draw *itself* which is being questioned in light of the available lesser-intrusive means of testing begs the very question being asked. In other words, the State cannot legitimately proffer that Mr. Neevel had no standing to raise the question herein because he gave his implied consent to testing and that the implied consent statute itself is constitutionally legitimate based upon that same consent. According to the State's skewed view of the world, the implied consent statute reinforces Mr. Neevel's consent to a blood test and his consent to a blood test confirms the constitutionality of the statute's enforcement. Such bootstrapping should be rejected without the slightest apology.

As to the State's position that because there is no allegation that Mr. Neevel refused to submit to a blood test, and therefore he lacks standing to challenge the manner in which the implied consent law was implemented in his case, this argument fails as well because in either scenario *he was still subject to the procedures employed thereunder*. That is, his challenge is (again) not to the implied consent law *itself*, but rather to the manner in which it is executed. Mr. Neevel questions whether law enforcement officers are constitutionally obligated to request the least intrusive means of testing from "square one." Since that was *not* done in his case, he has standing to argue that it *should* have been done. He need not "refuse" a test first before he can raise the procedural question.

III. *BIRCHFIELD* IS NOT DISTINGUISHABLE FROM THE INSTANT CASE IN THE MANNER THE STATE SUGGESTS.

The State next proffers that Mr. Neevel's position ought to be rejected because, unlike the criminalization of refusal offenses in the cases consolidated in the *Birchfield* decision, Wisconsin does not criminalize the offense of refusing to submit to an implied consent test. SRB at pp. 13-16. Mr. Neevel concedes that this difference between the cases examined in *Birchfield* and his case, however, this is a distinction without a difference.

That is, it is Mr. Neevel's position that *regardless* of whether a refusal offense is criminal or not, the reasonable execution of an implied consent law under the auspices of the Fourth Amendment requires that the *least intrusive means* of testing be offered *before* the government seeks to obtain the most intrusive form of testing. This question has nothing to do with whether an individual is subject to criminal prosecution for the act of refusing testing because Mr. Neevel is not attempting to argue that refusing testing is reasonable when the least intrusive means of testing is not first offered. His appeal has absolutely nothing to do with the act of refusing to submit to an implied consent test. Rather, it focuses solely on the issue of what actions undertaken by the government under the Fourth Amendment when implementing an implied consent statute are reasonable. Mr. Neevel's appeal focuses on the *government* and not on the exercise of the "right to refuse" chemical testing. In this regard, therefore, the State's effort in distinguishing *Birchfield* is a non-starter.

IV. MR. NEEVEL IS NOT ASKING THIS COURT TO "REWRITE THE IMPLIED CONSENT LAW."

The State next turns its attention to what is otherwise known as "legislating from the bench," arguing that if this Court adopts his position, it will be "rewriting" Wisconsin's Implied Consent Law. SRB at pp. 16-17. Nothing could be further from the truth.

The closest example of what Mr. Neevel is asking this Court to do—while found in other, innumerable cases—is best analogized to the United States Supreme Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966). There is literally *no* provision of the United States Constitution which expressly provides that a suspect in custody in a criminal case be verbally advised of his or her right to remain silent or right to counsel or even to the appointment of counsel for him or her should the person not be able to afford the same. The Supreme Court, however, recognized the constitutional need to advise suspects of these rights and compelled law enforcement officers to inform suspects of them.

The State argues that it is not for the courts to engage in "curative action," but rather for the legislature. SRB at p.18. Mr. Neevel, however, would respond that it is not for the courts to ignore the constitution, whether it be the Fourth or Fourteenth Amendments to the U.S. Constitution or Article I, §§ 8(1) and 11 of the Wisconsin Constitution. Only the judiciary is charged with enforcing these constitutions against encroachments thereon. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 229 (1973).

The authority relied upon by the State at page eighteen of its Response Brief involves cases which did not raise substantial constitutional questions. *See Madison Teachers v. Madison Metro. Sch. Dist.*, 197 Wis. 2d 731, 739-40, 541 N.W.2d 786 (Ct. App. 1995)(raising questions related to the jurisdictional authority granted under certain procedural statutes); *State ex rel. McCarty v. Gantter*, 240 Wis. 548, 552, 4 N.W.2d 153 (1942)(examining whether an ordinance was in accord with a state statute); *Wagner Mobil v. City of Madison*, 190 Wis. 2d 585, 302, 527 N.W.2d 301 (1995)(addressing whether a local annexation ordinance was in conflict with the legislative intent underlying a state statute).

None of the foregoing cases involved the weightier questions implicated in this appeal because Mr. Neevel's issue is of constitutional magnitude. Frankly, any reservations regarding "legislating from the bench" go "out the window" once it is determined that a question involves the application of constitutional principles. If this was not the case, no statute could ever be declared

unconstitutional, either substantively or in its application, because, applying the State's logic, *all* questions regarding the enforcement of a statute would have to be "left to the legislature."

V. SUPPRESSION IS AN APPROPRIATE REMEDY.

Finally, the State proffers that suppression is not an appropriate remedy in the instant case because the arresting officer acted in "good faith" when enforcing the implied consent law. SRB at pp. 18-21. A similar argument was recently rejected in in *State v. Blackman*, 2017 WI 77, 377 Wis. 2d 339, 898 N.W.2d 774. The *Blackman* court addressed the issue of whether misinformation provided to a suspect under the rubric of the implied consent law vitiated the person's consent to a test even though the officer acted in "good faith" when he read the Informing the Accused form to Blackman. *Id*. ¶¶ 71-73. The *Blackman* court rejected the "good faith" argument and refused to permit the State to use the test against Blackman, instead concluding that suppression was *required*. *Id*. ¶¶ 71-73. This case is different than that faced by the court in *Blackman* from "square one" in that the initial issue raised in Blackman concerned whether the Informing the Accused form accurately described a procedural aspect of the implied consent *statute*. Here, Mr. Neevel raises a question regarding whether the procedures followed are constitutional from the start.

The officer in this case made his election to proceed under the implied consent statute, and like the sanctions imposed against the State in *Blackman*, there are consequences for that decision. For all of the reasons previously enumerated, the State is simply wrong when it asserts that the good faith exception to the exclusionary rule applies in the instant case. The good faith exception is not applicable, and should be rejected just as it was in *Blackman*.

V. CONCLUSION

Based upon the foregoing authorities and arguments, Mr. Neevel posits that the current state of Fourth Amendment jurisprudence, in light of the pronouncements in such cases as *Schmerber v. California* and *Birchfield v. North Dakota*, and

Missouri v. McNeely, compel law enforcement officers to provide suspected drunk drivers with the opportunity to submit to less-intrusive means of testing other than blood testing when seeking to obtain evidence of a person's alcohol concentration, and that the failure to do so violates the reasonableness requirement of the Fourth Amendment. As such, when the opportunity to submit to a primary test other than blood is not offered, the accused's Fourth Amendment rights are violated and the only viable remedy for such a violation is suppression of the State's test.

Dated this 10th day of May, 2021.

Respectfully submitted:

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By:_____

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CERTIFICATION

I hereby certify that this Brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is proportional serif font. The text is 13-point type and the length of the Brief is 3,232 words. I certify that I have submitted an electronic copy of this Brief which complies with the requirements of Wis. Stat. § 809.19(12). The electronic Brief is identical in content and format to the printed form of the brief. Additionally, this Brief was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on May 5, 2021. I further certify that the Brief and appendix was correctly addressed and postage was pre-paid.

Dated this 10th day of May, 2021.

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