FILED
09-12-2022
CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2021AP001543/2022AP000307

In the Matter of the Refusal of Samuel G. Sharpe

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SAMUEL G. SHARPE,

Defendant-Appellant.

ON APPEAL FROM THE DECISIONS AND ORDERS ENTERED IN THE CIRCUIT COURT FOR ST. CROIX COUNTY, CASE NO. 2019 TR 632, THE HONORABLE SCOTT R. NEEDHAM, PRESIDING

# BRIEF OF THE PLAINTIFF-RESPONDENT

AARON M. DAMRAU
Assistant District Attorney
State Bar #1094312

Attorney for Plaintiff-Respondent

St. Croix County District Attorney's Office
1101 Carmichael Road
Hudson, WI 54016
(715) 386-4658
aaron.damrau@da.wi.gov

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Cases

Statutes

## STATEMENT OF THE ISSUE

**I. Whether the trial court erred in finding that the Defendant-Appellant's refusal was improper?**

The trial court answered no.

This Court should answer no.

**II. Whether Wisconsin's Ignition Interlock Device statutory scheme violates the dormant commerce clause?**

The trial court answered no.

This Court should answer no.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument but believes publication is appropriate under Wis. Stat. §§ 809.23(1)(a)1 and 5. Specifically, this case clarifies the constitutionality of Wisconsin IID law which is of substantial public interest.

## STATEMENT OF THE CASE AND FACTS

On February 16, 2019, around 2:29 a.m., Defendant-Appellant (Sharpe) was pulled over in the Village of Star Prairie, St. Croix County, and subsequently arrested for operating a motor vehicle while intoxicated. (R.51 at 6)(R.55 at 1) He was given a notice of intent to revoke operating privilege based on his refusal to submit to a chemical test. (R.55 at 1). At the time of the offense, Sharpe held a Minnesota driver's license and had a Minnesota mailing address. (R.1 at 1).

At the refusal hearing on February 12, 2021, St. Croix County Sheriff's Department Sergeant Chase DuRand testified that he was on patrol near River Island Park near Star Prairie when his attention was drawn to a black Chevrolet parked angled against a snowbank in the village park after closing hours. (R. 55 at 1). The vehicle appeared to be recently parked as there was no frost on it. (R.55 at 1).

DuRand approached the vehicle and identified the driver as Sharpe and the passenger as Jayme Bakkenstuen. (R.55 at 1). DuRand detected a moderate order of alcohol emanating from the vehicle and Sharpe admitted to consuming alcohol. (R.51 at 9-10). Sharpe's eyes

appeared to be bloodshot and glossy. (R.51 at 11). Sharpe failed standard field sobriety testing and the results of the preliminary breath test showed a .206 blood alcohol content. (R.55 at 2). Sharpe was arrested for operating a motor vehicle while intoxicated. (R.55 at 2).

After Sharpe was arrested, Sergeant DuRand read him the Informing the Accused form and asked him to submit to a chemical test of his breath. (R.55 at 2). Sharpe refused and he was issued a Notice of Intent to Revoke Operating Privilege based on his refusal to submit to the breath test. (R.55 at 2). Before reading the informing the accused, Sergeant DuRand and Deputy Schaeppi had a conversation in the squad car with amongst themselves regarding the number of prior convictions, while Sharpe sat in the backseat. (R.51 at 26-28). Ultimately Deputy Schaeppi advised Sharpe that it has been 10 years since his last OWI offense and that this would be his first offense. (R.51 at 29). This information was incorrect and Sharpe was ultimately charged with an OWI 3rd offense.

At the refusal hearing, DuRand testified that he "misidentified" Sharpe's driving record as a first offense when it actually was prosecuted as a third. (R.55 at 2). Had DuRand been aware this was a third offense, he testified that he would have asked Sharpe to submit to a blood test pursuant to departmental policy opposed to the breath test that was offered. (R.55 at 2).

Sharpe testified that he had been arrested twice before this incident for OWI offenses in Minnesota. (R.51 at 32). Sharpe testified that he "knew the penalties for a first were less. And [he] didn't want the officer to have more evidence against [him], so [he] decided to take [his] chances and not submit to further testing." (R.51 at 36).

On April 21, 2021, the trial court issued a decision and order finding that under the three-prong inquiry of *County of Ozaukee v. Quelle*, 198 Wis. 2d 269, 542 N.W.2d 196 (Ct. App. 1995), that Sharpe failed to prove by a preponderance of the evidence that the erroneous information provided by DuRand caused him to refuse to submit to chemical testing. (R.55 at 6).

On September 7, 2021, Sharpe filed a motion with the trial court asking the court to remove the ignition interlock device (IID) as a sentencing consideration due to the law being unconstitutional on its

face or as applied to him. (R.149 at 1-2). The trial court issued an order on the motion on February 18, 2022 finding that Sharpe failed to show that Wisconsin's IID law is unconstitutional beyond a reasonable doubt and his challenge failed as a matter of law. (R.149 at 3). Further, the trial court found Sharpe failed to prove that his constitutional rights have actually been violated by application of the law. (R.149 at 4).

## ARGUMENT

### I. SERGEANT DURAND COMPLIED WITH THE INFORMATION PROVISIONS OF WIS. STAT. § 343.305(4) AND SHARPE FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT THE ERRONEOUS INFORMATION PROVIDED BY DEPUTIES CONTRIBUTED TO HIS REFUSAL TO SUBMIT TO CHEMICAL TESTING

#### A. Introduction and Standard of Review.

Sharpe argues that the additional information provided by Deputy Schaeppi regarding the number of prior OWIs contributed to his refusal and that this would be counted as a first offense. He claims that this "robbed" him of his ability to make a free and unconstrained choice on whether to comply with Wisconsin's implied consent law. (Brief of Defendant-Appellant at 20). For the reasons set-forth below, the State requests that this Court affirm the trial court's order and findings that Sharpe improperly refused to submit to chemical testing after an OWI arrest.

The application of the implied consent statute to a set of facts is a question of law reviewed by this Court *de novo*. *State v. Rydeski*, 214 Wis. 2d 101, 106, 571 N.W.2d 417, 419 (Ct. App. 1997). "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Wis. Stat. § 805.17(2).

### B. Sharpe's refusal was unlawful and the additional information provided by law enforcement did not contribute to his refusal.

Wisconsin's implied consent law reads:

> Any person… who drives or operates a motor vehicle upon the public highways of this state … is deemed to have given consent to one or more tests of his or her breath, blood or urine, for the purpose of determining the presence or quantity in his or her blood or breath, of alcohol, controlled substances, controlled substance analogs or other drugs, or any combination of alcohol, controlled substances, controlled substance analogs and other drugs, when requested to do so by a law enforcement officer.

Wis. Stat. § 343.305(2).

Refusal to submit to a chemical test for intoxication cannot result in revocation of operating privileges unless the person has first been adequately informed of his rights under Wis. Stat. §343.305(4); *In re Smith*, 308 Wis.2d 65, 87. Specifically, "at the time a chemical test specimen is requested … the law enforcement officer shall read the following to the person from whom the test specimen is requested:"

> You have either been arrested for an offense that involves driving or operating a motor vehicle while under the influence of alcohol or drugs, or both, or you are the operator of a vehicle that was involved in an accident that caused the death of, great bodily harm to, or substantial bodily harm to a person, or you are suspected of driving or being on duty time with respect to a commercial motor vehicle after consuming an intoxicating beverage. 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. If you take all the requested tests, you may choose to take further tests. You make take the alternative test that this law enforcement agency provides free of charge. You also may have a test conducted by a qualified person of your choice at your expense. You, however, will have to make your own arrangements for that test. If you have a commercial driver license or were operating a commercial motor vehicle, other consequences may result from positive test results or from refusing testing, such as being placed out of service or disqualified.

*Id*. A driver has improperly refused to submit to a chemical test under the implied consent statute if the law enforcement officers correctly conveys all information required by applicable statute and correctly informs the driver of the penalties he faces under Wisconsin law. *In re Smith*, 308 Wis.2d 65, 87.

When the adequacy of the implied consent warnings is at issue, the court applies the following three part test:

> 1. Has the law enforcement officer not met, or exceeded his or her duty under §§ 343.305(4) and 343.305(4m) to provide information to the accused driver;
>
> 2. Is the lack or oversupply of information misleading; *and*
>
> 3. Has the failure to properly inform the driver affected his or her ability to make the choice about chemical testing?

*Cnty. of Ozaukee v. Quelle*, 198 Wis. 2d 269, 280, 542 N.W.2d 196, 200 (Ct. App. 1995), *abrogated by In re Smith*, 2008 WI 23, 308 Wis. 2d 65, 746 N.W.2d 243 (abrogated on other grounds).

When an officer gives information in addition to the information set forth in Wis. Stat. § 343.305(4) and when the additional information is erroneous, it is the defendant's burden to prove by a preponderance of the evidence that the erroneous additional information in fact *caused* the defendant to refuse to submit to chemical testing. *State v. Ludwigson*, 212 Wis. 2d 871, 876, 569 N.W.2d 762, 765 (Ct. App. 1997) (emphasis added). The trial court judge, "acting as the trier of fact, assesses the credibility of the two sides and determines as a matter of fact whether the erroneous extra information caused the defendant to refuse to take the test." *State v. Ludwigson*, 212 Wis. 2d 871, 876, 569 N.W.2d 762, 765 (Ct. App. 1997).

"When a party fails to produce any credible evidence as to an element, the party fails to meet his or her burden of proof as a matter of law. *State v. Ludwigson*, 212 Wis. 2d 871, 877, 569 N.W.2d 762, 765 (Ct. App. 1997) (citing *State v. Hedstrom*, 108 Wis.2d 532, 535, 322 N.W.2d 513, 515 (Ct.App.1982)). "…due regard shall be given to the

opportunity of the trial court to judge the credibility of the witnesses." Wis. Stat. § 805.17(2).

The State concedes the first two prongs of *Quelle*. Specifically, that Sergeant DuRand exceeded his duty under §343.305(4) and that the oversupply of information was misleading.

However, the State agrees with the findings of trial court that Sharpe's "self-serving testimony at the refusal hearing that he 'definitely would have considered' submitting to a blood test was unconvincing and hardly dispositive of the issue." (R.55 at 5) (Decision and Order of the Trial Court, April 21, 2021).

The additional information provided by deputies was related to the number of Sharpe's previous operating while intoxicated convictions which is separate from Sharpe's obligation to comply with his duty under Wisconsin's implied consent law. The discussion on Sharpe's prior offenses occurred before Mr. Sharpe was read the informing the accused form.

The night of the offense, Sharpe's defense was that he was not driving, that he had "zero intentions of driving" (R.122 at 2) and that his passenger drove them to the park. (R.122 at 4). He was arguing with law enforcement about whether he was the driver, before, and after, Sergeant DuRand read him the informing the accused.

> DuRand: …Will you submit to an evidentiary chemical test of your breath?
>
> Sharpe: No.
>
> DuRand: No?
>
> Sharpe: No.
>
> DuRand: Okay.
>
> Sharpe: No, I wasn't driving. I didn't even have the keys in the ignition. [inaudible] purposely did that. I'm not trying to drive. I did not do that. I was not trying to and I did not intend to. In fact, I did not drive here. She drove here. I had no intentions of driving. I took my keys out of the ignition [inaudible]….

(R.122 at 4). Immediately after DuRand read the informing the accused form, Sharpe did not ask any questions relating to the form, its contents, or potential penalties relating to refusing a breath or blood test, nor penalties or consequences relating to his refusal. Further, Sharpe did

not question the deputies regarding the penalties of operating while intoxicated offenses in Wisconsin.

The body camera video of that interaction, coupled with Sharpe's testimony that he "didn't want the officer to have more evidence against [him], so [he] decided to take [his] chances and not submit to further testing," (R.51 at 36) contradict his theory that but/for the erroneous information, he would have "considered" taking the test. (R.51 at 37). Sharpe knew he got caught, he knew that this was his third OWI offense, and he thought he got one past officers as they only believed it was a first offense at the time of arrest.

Regardless of the number of Sharpe's previous convictions, he was still arrested for an OWI and required to provide a sample of his breath or blood, regardless of the number of prior OWIs. The confusion by Sergeant DuRand about Sharpe's driving record had little or no bearing on his decision to submit to the breath test. Sergeant DuRand read the informing the accused form in its entirety and ultimately Sharpe refused to submit to a test as required under the law.

Sharpe cites *State v. Sutton*, 177 Wis.2d 709, 713-15, 503 N.W.2d 326 (Ct. App. 1993) (citing *State v. Wilke*, 152 Wis.2d 243, 249-250, 448 N.W.2d 13 (Ct. App. 1989), that to comply with the implied consent statute, "that the officer must not understate the penalties for either refusal to take the test or taking the test and obtaining an inappropriate test result." (*Id*.).

Sergeant DuRand did not go into the different a penalties associated with a first, second, or third offense, and no erroneous information was conveyed to Sharpe regarding the penalties. Sharpe testified he was aware that there were increasing penalties for impaired driving offenses and there is no evidence to support that law enforcement "understated the penalties" for a refusal. (R.51 at 36-37).

In weighing credibility, the trial court looks at the motivation of the person testifying and the surrounding circumstances. Here, the self-serving testimony by Sharpe does not line up with his defense the night of the incident. That night, Sharpe went with the "I wasn't driving" defense even though he was caught in a vehicle in a public park after dark, with keys in the ignition. There are no questions or comments by Sharpe to law enforcement on the penalties or consequences of refusing

an evidentiary test after law enforcement went back and forth with each other in front of him on what number offense this was. Sharpe was read the informing the accused form verbatim, he answered no, and followed up with that he was not driving and someone else drove to the park.

Sharpe's self-serving testimony is not compelling and Sharpe has not met his burden to prove by a preponderance of the evidence that the erroneous information provided by Schaeppi contributed to his refusal to submit to chemical testing as required under Wisconsin's implied consent statute. Wherefore, the State requests this Court affirm the trial court's findings and orders.

## II. WISCONSIN'S IGNITION INTERLOCK DEVICE STATUTORY SCHEME IS CONSTITUTIONAL AND DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE.

### A. Introduction

The Defendant-Appellant (Sharpe) claims that Wisconsin's ignition interlock device (IID) law, Wis. Stat. § 343.301, is unconstitutional, both facially and as applied to him. As described below, the IID law applies the same way to all drivers, whether they are licensed in Wisconsin or another state. Sharpe is not asking that the IID law be applied to him the same way it applies to a driver licensed in Wisconsin. He is arguing that because he is licensed in Minnesota rather Wisconsin, he should be allowed to drive in Wisconsin without an IID, even though a person licensed in Wisconsin would be required to have an IID to drive. Sharpe has not satisfied his burden of showing that the IID law is unconstitutional facially, or as applied to him and the trial court order denying his motion should be affirmed.

### B. Constitutionality of Statutes and Standard of Review

When a court addresses the issue of whether a statute passes constitutional muster, the presumption is in favor of constitutionality. Respect for a co-equal branch of government demands that statutes must be presumed to be constitutional, and will not be found to be unconstitutional unless their invalidity is established beyond a reasonable doubt. *Dane County DHS v. Ponn P.*, 2005 WI 32, ¶¶ 16-

18; *State v. Cole*, 2003 WI 112, ¶¶ 11, 17 (and cases cited). A court must indulge every presumption and resolve every doubt in favor of sustaining the law. *Ponn P.*, 2005 WI 32 at ¶ 17; *Cole*, 2003 WI 112 at ¶ 11.

When faced with a claim that a statute which reflects the considered will of the people is unconstitutional, a court cannot become mired with the merits of the legislation, but must instead afford due deference to the determination of the Legislature. *State v. Cole*, 2003 WI 112, ¶ 18. The presumption of constitutionality can be overcome only if the challenging party establishes that the statute is unconstitutional beyond a reasonable doubt. *Wis. Med. Soc'y, Inc. v. Morgan*, 2010 WI 94, ¶ 37, 328 Wis. 2d 469, 787 N.W.2d 22. This presumption of constitutionality and the Sharpe's steep burden apply to both as-applied challenges and facial challenges to statutes. *State v. McGuire*, 2010 WI 91, ¶ 25, 328 Wis. 2d 289, 786 N.W.2d 227.

A facial challenge to the constitutionality of a statute cannot succeed unless the law cannot be enforced under any circumstances. *State v. Wood*, 2010 WI 17, ¶ 13, 323 Wis. 2d 321, 780 N.W.2d 63. An as-applied challenge is determined on the facts of the case. *Id.* A court "assess[es] the merits of the challenge by considering the facts of the particular case" in front of it, "not hypothetical facts in other situations." *Id.* (quoting *State v. Hamdan*, 2003 WI 113, ¶ 43, 264 Wis. 2d 433, 665 N.W.2d 785.) An as-applied challenge requires the challenger to "show that his or her constitutional rights were actually violated." *Id.*

Resolution of the issue in this case requires statutory interpretation. In interpreting a statute, a reviewing court "begins with the plain language of the statute." *State v. Dinkins*, 2012 WI 24, ¶ 29, 339 Wis. 2d 78, 810 N.W.2d 787 (citing *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110). A court "generally give[s] words and phrases their common, ordinary, and accepted meaning." *Id.* (citing *Kalal*, 271 Wis. 2d 633, ¶ 45). A reviewing court is to "interpret statutory language reasonably, 'to avoid absurd or unreasonable results.'" *Id.* (citing *Kalal*, 271 Wis. 2d 633, ¶ 46). "An interpretation that contravenes the manifest purpose of the statute is unreasonable." *Id.* (citing *Kalal*, 271 Wis. 2d 633, ¶ 49).

## C. SHARPE HAS NOT SHOWN THAT WISCONSIN'S IID LAW IS UNCONSTITUTIONAL ON ITS FACE OR AS APPLIED TO HIM.

### 1. Description of Wisconsin's IID Statutes

At sentencing, Wisconsin courts are required to impose an IID order upon conviction for an OWI 2 or subsequent, and for an OWI 1 with a test of .15 BAC or above. Wis. Stat. §§ 343.301(1g)(a)1.-2. Sentencing courts may not refuse to order an IID if it is required under the statute. The IID order applies to the person's Class D operating privilege only. Wis. Stat. § 343.301(1g)(am)1. The court's order has two parts: 1) The person's Class D privilege is restricted to allow the person to operate only vehicles that are equipped with an IID; and 2) Each motor vehicle registered to the person must have an IID installed in it, unless a vehicle is specifically exempted by the court. Wis. Stat. § 343.301(1g)(am)1.

The IID restriction goes into effect on the date the order is issued. Wis. Stat. § 343.301(2m)(a). Typically this means that as soon as the defendant leaves the courtroom:

1) The defendant may not drive a vehicle that is not installed with an IID; and
2) The defendant must install an IID in every vehicle registered in their name, or seek an exemption under Wis. Stat. § 343.301(1m); and
3) The defendant is subject to a .02 BAC restriction. Wis. Stat. § 340.01(46m)(c).

The minimum length for an IID order is 12 months, and the maximum is the same as the maximum revocation period for the offense of conviction. Wis. Stat. § 343.301(2m). The person is subject to the IID restriction starting on the date of the order. However, the time period for the IID order imposed by the court does not begin until the DOT grants the person a regular or occupational license. Wis. Stat. § 343.301(2m). The end date is calculated by starting from the date on which the DOT grants the person a regular or occupational license in Wisconsin and adding the length of the order. This means that until a

person completes the requirements and obtains a regular or occupational license, the IID time period imposed by the court does not start.

In order for a person who is subject to an IID order to obtain a regular or occupational license in Wisconsin, the person must show that an IID has been installed in each vehicle to which the order applies, or that the court has exempted one or more vehicles. Wis. Stat. § 343.10(2)(f). The person must also complete an AODA assessment and demonstrate compliance with the driver safety plan. Wis. Stat. §§ 343.10(2)(e)/343.10(7)(cm) (occupational); Wis. Stat. § 343.30(1q)(d)2. (regular). The person must also show proof of payment of the IID surcharge. Wis. Stat. § 343.10(2f). The IID requirement is reflected on the person's Wisconsin Class D driver license. Wis. Stat. § 343.17(3)(b). The law is not facially unconstitutional; it is obvious that its application works as written, and a facial challenge to the constitutionality of a statute cannot succeed unless the law cannot be enforced under any circumstances. *State v. Wood*, 2010 WI 17, ¶ 13.

The legislature has directed in § 343.301(2m)(a) that a person's operating privilege is restricted to only vehicles equipped with an IID from the date they are convicted until a court-set period passes "*after the date the department issues any license granted under this chapter*" (emphasis added). The statute is very precise. It does not allow the IID period to start when another state issues the driver a license; it clearly requires that the license be issued under Ch. 343, Stats.

Before the enactment of 2017 WI Act 124, the law did not include the timetable as it is currently described in Wis. Stat. § 343.301(2m). In the previous version of the statute, the IID restriction did not even begin until the person sought to obtain a regular or occupational license in Wisconsin. Prior to Act 124, all drivers could essentially "wait out" an IID order by choosing to never get another valid license. This allowed Wisconsin offenders to never be under an IID requirement, if they didn't mind not having a license. It allowed all out-of-state offenders to avoid the IID requirement entirely. This change in the law was intentional; it was done specifically to prevent individuals who had been convicted of OWI from driving without IIDs, as required.

### 2. Wisconsin's operating privilege laws work the same way for drivers licensed in Wisconsin as those licensed in another state.

Drivers from other states are not, and cannot be, licensed by the State of Wisconsin. Instead, they are licensed by their home states. These drivers are provided with an opportunity to drive in this state under their out-of-state license by virtue of Wis. Stat. § 343.05(4)(b)1.**,** which exempts from Wisconsin driver license requirements a "nonresident who is at least 16 years of age and who has in his or her immediate possession a valid operator's license issued to the person in the person's home jurisdiction."

When a nonresident driver's license is revoked in Wisconsin, the person must follow the same process as any Wisconsin-licensed driver to reinstate his or her operating privilege. Wis. Stat. § 343.37(2). Once the person reinstates their operating privilege, they may legally operate a motor vehicle in the state—the same as a Wisconsin driver.

The IID requirement is similar to the license revocation requirement, in that it is a restriction that is placed on a person's Wisconsin license, which sentencing courts are required to impose when a person is convicted of OWI. Wis. Stat. § 343.301. Out of state drivers cannot operate motor vehicles in Wisconsin if their Wisconsin operating privilege is suspended or revoked. Wis. Stat. §§ 343.44(1)(a) and (b). Sharpe is not claiming that the revocation requirement is not constitutional, because he cannot; states have the ability to revoke the operating privileges of individuals who have been convicted of certain offenses within their borders. *See, e.g., In re Smith*, 2008 WI 23, ¶ 82, 308 Wis. 2d 65, 101, 746 N.W.2d 243, 260 ("[When reading the Informing the Accused,] [o]fficers impart information about Wisconsin law and cannot be required to decide whether another state's law might govern or to explain that other state's law.").

At sentencing for an OWI, the court is required to place certain restrictions on the person's Wisconsin operating privilege. These restrictions are the same for Wisconsin residents and out of state residents. However, the restrictions are only enforceable within the state. When an out of state resident is in their home state, they may do what they wish. But when they return to Wisconsin they are treated the

same as any Wisconsin resident who has been convicted of the same offense.

### 3. Sharpe has not shown that Wisconsin's IID law is facially unconstitutional.

Sharpe claims that Wisconsin's IID law is unconstitutional because it forever burdens out-of-state residents wishing to use their motor vehicles in Wisconsin. Sharpe argues that the law violates the dormant Commerce Clause because it discriminates against interstate commerce. He asserts that the law impacts non-CDL drivers, including, "courier drivers, delivery drivers, food-delivery drivers, taxi drivers, chauffeurs, cater[ers] and rideshare subcontractors." (Defendant-Appellant Brief at 27).

To prevail on his claim, Sharpe must prove, beyond a reasonable doubt, that the law cannot be enforced under any circumstances. *State v. Wood*, 323 Wis. 2d 321, ¶ 13. He has not done so. The law works exactly the same for all licensed drivers, regardless of where they are licensed. In every case, if an IID restriction is ordered, it begins on the date it is ordered and lasts until the date the person is issued a Wisconsin driver's license.

An IID order issued in Wisconsin applies to the person's Class D Wisconsin operating privilege only. Wis. Stat. § 343.301(1g)(am)1. Further, Wisconsin laws cannot be applied by Minnesota courts, or vice versa. A Minnesota driver would never be prosecuted in a Minnesota court for the violation of a Wisconsin IID order. This statute does not prohibit a person not licensed in Wisconsin from obtaining or maintaining a license from another state. In fact, the IID order does not and cannot affect the person's out of state license at all. In this respect, the out of state driver is treated more favorably than a Wisconsin driver. A Wisconsin resident who is licensed in this state, and who has an IID restriction imposed on his or her license, is subject to that restriction when operating both in Wisconsin and in other states. On the other hand, the out of state resident who is convicted of OWI in Wisconsin only faces the IID restriction when operating in Wisconsin.

By imposing the IID restriction, the Legislature is not prohibiting out of state drivers from driving in this state. It merely

requires that a driver who has been convicted of impaired driving in Wisconsin must have a device in their vehicle which prevents them from repeating that behavior in Wisconsin. Out of state drivers may enter and travel throughout Wisconsin for any purpose without driving. They may drive in Wisconsin as well, provided they have a valid driver's license from another state and that they do so in a vehicle that is equipped with an IID. Wis. Stat. § 343.38(5). They are treated exactly the same as Wisconsin drivers with the same restriction.

A driver subject to an IID order in Wisconsin may also drive a commercial motor vehicle in Wisconsin so long as they have a valid CDL in another state. The Wisconsin IID order applies only to the person's Class D license, not to the person's CDL. Wis. Stat. § 343.37(2). The only effect of Wisconsin's IID law on a driver licensed in another state is that if the person drives in Wisconsin—not pursuant to their CDL—they must have an IID in the vehicle. The law has exactly the same effect on a driver licensed in Wisconsin.

Sharpe has not shown that Wisconsin's law discriminates against out of state drivers.

He has not shown that a person with a driver's license from another state cannot drive in Wisconsin. The only effect on a person licensed in another state is on the person's "normal" privilege—not on his ability to legally drive in Wisconsin under his CDL. And the only effect for the person's "normal" license is that it will be impractical to lift the IID restriction on that license.

Because the laws treat all drivers the same, no matter where they are from, the law is facially constitutional. By enacting these laws, the Legislature is not barring any person from coming to Wisconsin, or even from driving in Wisconsin. It is merely restricting the privilege to drive.

Driving a car is not a constitutional right, it is only a privilege. *Steeno v. State*, 85 Wis.2d 663, 671, 271 N.W.2d 396 (1978). Moreover, the Legislature has an interest in protecting Wisconsin's citizens from those who would commit crimes in our state. It is not required to extend any driving privilege to impaired drivers from out of state. Drinking to intoxication and then driving is not a constitutionally protected activity; the state Legislature has a right to make laws to

ensure that such conduct is not repeated by those who have already been convicted of OWI in Wisconsin.

Wisconsin and other states may take away a person's driving privilege for life if certain circumstances are present. Wis. Stat. § 343.31(1m). This is within the Legislature's authority; people whose privileges are taken away under this statute may never obtain a license in Wisconsin (unless certain circumstances are met, as per the statute). This rule applies to Wisconsin residents and out of state residents alike, however it is only enforceable in Wisconsin.

A person subject to an IID order in Wisconsin is free to exercise his or her constitutional right to travel in non-IID equipped vehicles, so long at the person does not drive the vehicle. Guests to this state are essentially not welcome to return to Wisconsin to repeat their criminal behavior. The imposition of lifetime loss of license or restrictions on impaired drivers is not completely irrational and does not deprive the restricted person of his or her constitutional right to travel. The requirement that a person have an IID in a vehicle to drive in Wisconsin because of their drunk driving offense is certainly not irrational or unconstitutional.

Sharpe has not shown the IID law has any effect whatsoever on interstate commerce, or that it prohibits drivers licensed in another State from driving in Wisconsin. He therefore has not shown that the law is facially unconstitutional.

#### 4. Sharpe has not shown that Wisconsin's IID law is unconstitutional as applied to him.

To prove that Wisconsin's IID law is unconstitutional as applied to him, Sharpe must prove that his constitutional rights have actually been violated by application of the law. *Wood*, 323 Wis. 2d 321, ¶ 13. He has not done so. Sharpe has not shown that the IID law has had any effect on him due to his being licensed in Minnesota than it would have had, had he been licensed in Wisconsin. He has not shown that he has been prevented from driving in Wisconsin by Wisconsin's IID law. He has not shown that he had to install an IID, but he would not have had to do so had he been licensed in Wisconsin. If Sharpe wants to drive in Wisconsin while the IID order is in effect, he can do so if he has a valid

driver's license and an IID in the vehicle he is driving. If he wants to drive a commercial motor vehicle in Wisconsin while the IID order is in effect, he can do so if he has a valid CDL. Sharpe has not even alleged that his constitutional rights have actually been violated.

The only potential effect on Sharpe would be that it might be impractical to have the IID restriction removed once he has completed the legal requirement of having an IID installed for a certain amount of time. But since he has not shown that he has ever had an IID installed in his vehicle, he has shown no harm at all. He has not complied with the court's order. Instead, he is trying to get a benefit that is not available to Wisconsin drivers in that he is asking this Court to rule that he should never have an IID at all. And in making this request, Sharpe has not shown that his constitutional rights have been violated, or that the IID law is unconstitutional.

Wisconsin's IID statutes are not unconstitutional, either facially or as applied to out-of-state drivers who are convicted of OWI in Wisconsin.

## CONCLUSION

For the foregoing reasons, this Court should affirm the judgment and orders of the trial court.

Dated this 12th day of September, 2022.

Respectfully submitted,

Electronically signed by:

AARON M. DAMRAU
Assistant District Attorney
State Bar #1094312

Attorney for Plaintiff-Respondent

St. Croix County District Attorney's Office
1101 Carmichael Road
Hudson, WI 54016
(715) 386-4658
aaron.damrau@da.wi.gov

## CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of this brief is 5,708 words.

Dated this 12th day of September 2022.

Electronically signed by:

AARON M. DAMRAU
Assistant District Attorney
State Bar #1094312

Attorney for Plaintiff-Respondent