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. 19 TR 632, THE HONORABLE SCOTT R. NEEDHAM, PRESIDING

DEFENDANT-APPELLANT'S REPLY BRIEF

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I. SHARPE DID NOT IMPROPERLY REFUSE TO SUBMIT TO CHEMICAL TESTING WHEN THE OFFICER VIOLATED *COUNTY OF OZAUKEE V. QUELLE.*

The state concedes the first two prongs of ***Quelle***.[1] "Specifically, that Sergeant DuRand exceeded his duty under § 343.305(4) and that the oversupply of information was misleading." (State's Resp. Br. 10).

The state nevertheless contends that "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." (State's Resp. Br. 12). The state's argument is erroneous.

When an officer exceeds his duty and gives extra information that is erroneous, "it is the defendant's burden to prove by a preponderance of the evidence that the erroneous information *caused* the defendant to refuse to take the test." ***State v. Ludwigson***, 212 Wis. 2d 871, 873, 569 N.W.2d 762 (Ct. App. 1997) (emphasis added).

In ***Ludwigson***, this Court determined that Ludwigson failed to carry the burden of producing evidence sufficient to make a prima facie showing of a causal connection between the officer's misleading statements and Ludwigson's refusal to submit to chemical testing. ***Id***. at 876. As this Court noted, "Ludwigson never presented *any* evidence to show that the erroneous information caused her to refuse to take the test." ***Id***. (Emphasis in original). She neither "took the stand on her own behalf" nor was she "able to point out anything in the officer's testimony which would auger for a causation finding in her favor." ***Id***.

Unlike Ludwigson, Sharpe demonstrated a causal link between the misinformation and his ultimate refusal of the chemical test. Sharpe took the stand

[1] ***County of Ozaukee v. Quelle*****,** 198 Wis. 2d 269, 542 N.W.2d 196 (Ct. App. 1995).

on his own behalf at the evidentiary hearing and testified that Schaeppi's claim that Sharpe's OWI arrest in this case would be treated as a first offense was the "[b]iggest factor" in his decision to refuse the evidentiary breath test. (51:39).

Sharpe testified that he was aware that the penalties for a first OWI offense are less severe than the penalties associated with subsequent OWI offenses. (51:36). He was further aware that by refusing the evidentiary breath test, he would be denying the government critical evidence that could be used at trial to prove his guilt, which turned out to be true. (51:36). Thus, Sharpe testified that upon hearing Schaeppi's additional information that his arrest in this case would be treated as a first offense, he believed he could "stomach" those penalties associated with a first OWI offense, regardless of whether he submitted or refused the evidentiary breath test. (51:37). Sharpe made clear that he would have considered consenting to a chemical test had he been informed that it would be prosecuted more severely than the police promised. (51:38). Sharpe therefore demonstrated by a preponderance of the evidence that Schaeppi's misinformation factored into his choice about chemical testing. *See* ***In Re Smith***, 2008 WI 23, ¶ 85, 308 Wis. 2d 65, 746 N.W.2d 243. (defendant must show that misleading information contributed to defendant's decision to refuse chemical testing).

Once the prima facie evidence has been submitted, the burden shifts to the state to prove otherwise. ***Ludwigson***, 212 Wis. 2d at 876. At the end, 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." ***Id***.

The state urges this Court to uphold the trial court's finding 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." (State's Resp. Br. 10–12). Yet the trial court's credibility determination is clearly erroneous.

Again, Sharpe explained in simple terms, "I knew the penalties for a first were less. And I didn't want the officer to have more evidence against me, so I decided to take my chances and not submit to further testing." (51:36). Sharpe testified, under oath and penalty of perjury, that he felt that he could stomach the penalties for a first offense, having been through them before. (51:37). The state offered no evidence to the contrary.

Sharpe further testified, under oath and penalty of perjury, that he would have considered taking the test if he had been advised that this were a third offense, or if he were simply not advised of the severity of the prosecution (the latter being the best practice for law enforcement). (51:37). The state again offered no evidence to the contrary.

The fact that the state offered no evidence to the contrary is significant because once Sharpe submitted his prima facie evidence, the state assumed the burden to prove otherwise. ***Ludwigson***, 212 Wis. 2d at 876. Moreover, in making its credibility determination, the circuit court must assess the credibility of the *two sides*. ***Id***.

The "ordinary" burden of proof requires an evaluation of the evidence in support of a contention in relation to "the evidence opposed to it." Wis. JI-Civil 200. The state offered no evidence opposed to Sharpe's testimony. The video corroborates his testimony. So too does the acquittal. The fact that his gambit worked makes his explanation believable "in light of reason and common sense." Wis. JI-Civil 200; *see also* ***Cullen v. United States***, 194 F.3d 401, 408 (2d Cir. 1999) ("The credibility determination should be based on all relevant circumstances."). It was therefore error to find Sharpe's testimony "unconvincing" and that the erroneous extra information did not cause Sharpe to refuse to take the test.

II. THE WISCONSIN IGNITION INTERLOCK DEVICE STATUTORY SCHEME VIOLATES THE DORMANT COMMERCE CLAUSE BECAUSE IT DISCRIMINATES AGAINST OUT-OF-STATE DRIVERS.

While Wisconsin residents can satisfy an IID order entered by a Wisconsin court, an out-of-state resident like Sharpe cannot. This is because an IID order issued by a Wisconsin court only ends sometime "*after*" the Wisconsin *Department of Transportation issues* a *license* under Chapter 343. Wis. Stat. § 343.301(2m). Yet out-of-state residents are not eligible for Wisconsin driver's licenses. *See* Wis. Stat. § 343.06(1)(k) ("The department shall not issue a license [t]o any person who is not a resident."). If a license is not, or cannot, be issued by the Department, the time on the IID order never starts to run. Whatever the length of the IID order, it can never be satisfied.

A Wisconsin resident with the same conviction as Sharpe, on the other hand, is eligible to get an occupational license after the first 120 days of the revocation period under Wis. Stat. § 343.305(10)(b)4.,[2] thus starting the clock on the IID period imposed by the court. Sharpe is denied that same right simply because he is a nonresident.

Ultimately, because Sharpe is a Minnesota resident, he can never rid himself of the IID restriction unless he moves to Wisconsin, pays the Wisconsin DMV for a license, and pays income (and other) taxes into Madison's coffers rather than Saint Paul's. That is discriminatory.

The notion of "discrimination" rests on a comparison of in-state benefits and burdens with out-of-state benefits and burdens. *See* ***Bacchus Imports, Ltd. v. Dias***,

[2] The general rule of statutory construction in Wisconsin where two statutes relate to the same subject matter is that the specific statute controls over the general statute. ***Kramer v. City of Hayward***, 57 Wis. 2d 302, 311, 203 N.W.2d 871 (1973). In this case, it is clear that Wis. Stat. §§ 343.06(1)(k) and 343.305(10)(b)4. relate to the same subject matter, namely, the issuance of Wisconsin operator licenses. However, Wis. Stat. § 343.06(1)(k) is a general statute and Wis. Stat. § 343.305(10)(b)4. is a specific statute. If this Court finds as a matter of law that Sharpe is eligible for an occupational license here pursuant to Wis. Stat. § 343.305(10)(b)4., then that avoids the present constitutional issue entirely and saves the Wisconsin IID statutory scheme.

468 U.S. 263, 273 (1984); *see also* ***Hughes v. Oklahoma***, 441 U.S. 322, 336 (1979) (recognizing that even statutes that purport to regulate evenhandedly may fall victim to the dormancy doctrine).

Citizens generally have the freedom to move to Wisconsin and become a taxpaying resident. But that is exactly what makes the Wisconsin IID statutory scheme unlawful. Under Wisconsin's IID statutory scheme, an out-of-state driver who is ordered by a Wisconsin court to comply with the IID restriction must confer an economic benefit to the State of Wisconsin by becoming a taxpaying resident before qualifying to satisfy the IID order. Such a state regulation that favors in-state economic interests over out-of-state interests is blatantly unlawful. *See* ***H.P. Hood & Sons v. Du Mond***, 336 U.S. 525, 526, 535 (1949) (endorsing broad state authority to protect the "health and safety" of residents but finding fault with license denial that would "protect and advance local economic interests"); ***Brown-Forman Distillers Corp. v. New York Liquor Auth.***, 476 U.S. 573, 579 (1985) ("When a state statute directly regulates or discriminates against interstate commerce, *or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry*." (Emphasis added).).

The state nevertheless asserts that Wisconsin's IID requirement is constitutional because it is "similar to [Wisconsin's] license revocation requirement." (State's Resp. Br. 16). This argument is erroneous for several reasons.

First, this argument rests on a faulty premise. While the state's argument attempts to treat "operating privilege" and "driver's license" interchangeably, Wisconsin's statutory scheme draws a clear distinction between the two, and for good reason. When a nonresident is convicted of OWI in Wisconsin, his *driver's license* is not revoked; rather, his *operating privilege* is. *See* Wis. Stat. § 343.305(10)(b)4. ("[T]he court shall revoke the person's *operating privilege*…"). This is because all drivers with a valid operator's license have *operating privileges* in sister states. *See, e.g.,* Wis. Stat. § 343.05(4)(b)1. And states have the ability to

revoke the *operating privileges* of nonresidents who have been convicted of certain offenses within their borders. Hence why Sharpe is not claiming that the revocation requirement is unconstitutional. Yet a state has no authority to revoke a foreign-issued driver's license of a nonresident. *See, e.g.,* ***State v. Coleman***, 216 Ga.App. 598, 599, 455 S.E.2d 604 (1995); ***Com., Dep't of Transp., Bureau of Driver Licensing v. Becraft***, 150 Pa. Cmwlth. 380, 384, 615 A.2d 967, 969 (1992). The state's argument that "when a nonresident *driver's license* is *revoked* in Wisconsin…" is therefore a misstatement of law. (State's Resp. Br. 16).

Second, the state's claim that a nonresident "must follow the same process as any Wisconsin-licensed driver to reinstate his or her operating privilege" is demonstrably wrong. (State's Resp. Br. 16). Wis. Stat. § 343.38 explicitly provides separate and distinct reinstatement processes for Wisconsin residents and for nonresidents. *Compare* Wis. Stat. § 343.38(1) *with* Wis. Stat. § 343.38(2).

Lastly, and most importantly, while Wisconsin's statutory scheme for reinstatement of operating privilege provides two separate and distinct processes for residents and for nonresidents, both processes nevertheless result in equal outcomes, unlike Wisconsin's IID statutory scheme. Specifically, operating privileges are reinstated for both Wisconsin residents and nonresidents alike once the period of revocation has expired and a fee has been paid. *See* Wis. Stat. §§ 343.38(1) and Wis. Stat. § 343.38(2). Wisconsin's reinstatement statutory scheme is therefore not discriminatory against nonresidents like Wisconsin's IID statutory scheme is.

To be constitutional, all Wisconsin's IID statutory scheme would need to say is that the time on the IID order starts to run, if the person is an out-of-state resident, when that person would be eligible to obtain any license under Chapter 343 if they were a Wisconsin resident. This would offer an out-of-state resident the opportunity to satisfy the IID order. However, Wisconsin's IID scheme does not offer nonresidents a way out of the restriction, in the way that Wisconsin's revocation scheme does. Thus, it violates the Dormant Commerce Clause.

Sharpe has clearly demonstrated that the discriminatory effect of the Wisconsin IID statutory scheme is both present and certain in his case. The circuit court has entered an IID order in his case. (72; 75). Eventually, remittitur will occur. If this Court rules in favor of the state, Sharpe will then suffer actual and imminent harm, that being his inability to ever satisfy the IID order as an out-of-state driver. ***Nat'l Treasury Emps. Union v. United States***, 101 F.3d 1423, 1428 (D.C. Cir. 1996) ("[I]f a threatened injury is sufficiently "imminent" to establish standing, the constitutional requirements of the ripeness doctrine will necessarily be satisfied.").

CONCLUSION

For the foregoing reasons, this Court should vacate and dismiss the circuit court's finding that Sharpe's refusal was improper and reinstate his Wisconsin operating privileges. Alternatively, this Court should find the statutory scheme under Chapter 343 which governs the imposition of IID restrictions on nonresidents is either facially unconstitutional or as applied to Sharpe, and remand for an amended order which removes any IID requirement.

Dated this 1st day of December, 2022.

Respectfully submitted,

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CERTIFICATION BY ATTORNEY

I hereby certify that this brief conforms to the rules contained in § 809.19 (8) (b), (bm) and (c) for a brief. The length of this brief is 2,162 words.

Dated this 1st day of December, 2022.

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