STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2022AP800

CITY OF WHITEWATER,

Plaintiff-Respondent,

vs.

DOUGLAS E. KOSCH,

Defendant–Appellant.

BRIEF OF DEFENDANT–APPELLANT

ON APPEAL FROM CONVICTIONS ENTERED ON MAY 10, 2022, IN THE CIRCUIT COURT FOR WALWORTH COUNTY, BRANCH 2, THE HON. DANIEL S. JOHNSON, PRESIDING

Respectfully submitted,

DOUGLAS E. KOSCH,
Defendant-Appellant

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STATEMENT OF THE ISSUES

I. Did law enforcement have reasonable suspicion to seize Kosch, probable cause to request a preliminary breath test, and probable cause to arrest Kosch without a warrant?

The trial court answered yes.

II. Did the trial court err in denying Kosch's motion to reconsider its ruling that the seizure of Kosch was supported by reasonable suspicion?

The trial court answered no.

III. Is Wisconsin's implied consent statute unconstitutional on it's face, and as applied to the facts of Kosch's case, requiring dismissal of the refusal action?

The trial court answered no.

IV. Were the closing arguments of the Plaintiff at trial sufficiently prejudicial to warrant granting Kosch's motion for mistrial and dismissal with prejudice?

The trial court answered no.

V. Was Kosch's refusal to submit to a breath alcohol test unreasonable?

The trial court answered yes.

STATEMENT ON PUBLICATION

Kosch requests publication under Wis. Stat. § 809.23(1)(a). No Wisconsin court to counsel's knowledge has addressed, based on recent Fourth Amendment holdings by the U.S. Supreme Court, whether the rule from *Griffin v. California*[1] is now applicable to Wisconsin's implied consent statute. A published opinion would clarify whether the *Griffin* rule is applicable and whether that rule constitutionally bars the civil penalties and evidentiary consequences imposed by Wisconsin's implied consent statute. As this seems to be the next frontier in implied consent litigation, publication would afford the Court an opportunity to enunciate or clarify a rule of law and decide a case of substantial and continuing public interest.

STATEMENT ON ORAL ARGUMENT

Oral argument would be appropriate in this case only if the Court concludes that the briefs have not fully presented the issue on appeal.

[1] ***Griffin v. California***, 380 U.S. 609, 613–15, 85 S. Ct. 1229, 1232–33, 14 L. Ed. 2d 106 (1965).

STATEMENT OF THE CASE AND FACTS

On September 7, 2019, Kosch was pulled over by Officer Jennifer Ludlum of the Whitewater Police Department, in the City of Whitewater, based on a report of a vehicle being involved in an alleged domestic incident.[2] Kosch performed field sobriety tests (FSTs), declined a preliminary breath test (PBT), was arrested for allegedly operating while under the influence (OWI), whereafter he was read the informing the accused form by Ludlum and declined to submit to a warrantless chemical test of his breath. Kosch was issued a citation for OWI as well as a notice of intent to revoke his operating privileges.[3] Kosch demanded a refusal hearing[4] and the OWI and refusal citations proceeded to a court trial in the Whitewater Municipal Court, on November 11, 2020.[5] Kosch was found guilty of both citations by the municipal court, and appealed those judgments *de novo* to the Walworth County Circuit Court.[6] The refusal and OWI citations were consolidated into one case as Walworth County Case Number 2020CV602.[7]

Kosch filed a motion to suppress based on Fourth Amendment violations, which challenged reasonable suspicion for the traffic stop, probable cause for the PBT, and probable cause to arrest.[8] An evidentiary hearing was held on Kosch's motion to suppress, on August 3, 2021.[9] Ludlum testified at this motion hearing as follows: She received a

[2] R. 88:4–5.
[3] R. 5:1; R. 7:1.
[4] R. 8:1.
[5] R. 21.
[6] R. 3:1.
[7] R. 28:1–2.
[8] R. 37:1–16.
[9] R. 88:1.

description of the vehicle (dark colored SUV) from dispatch or another officer, a motel employee pointed a vehicle out to her, and she did not obtain a license plate for the suspect vehicle.[10] She may have lost visual contact with the suspect SUV while running to her police cruiser to follow it, but eventually pulled the SUV over on Milwaukee Street in the parking lot of a ReMax.[11] She did not observe the driver of the SUV commit any traffic infractions prior to the traffic stop.[12] Kosch's speech was slurred, Kosch stated that he had consumed two beers, and that based on these observations she had Kosch perform FSTs.[13] She observed 4 out of 6 clues on the Horizontal Gaze Nystagmus (HGN) test, 5 out of 8 clues on the Walk and Turn (WAT) test, and that Kosch put his foot down twice during the One Leg Stand (OLS) test.[14] She acknowledged that FSTs must be administered according to guidelines set by the National Highway Traffic Safety Administration (NHTSA), and that deviating from NHTSA guidelines may compromise the accuracy of the FSTs.[15]

At the suppression hearing, Ludlum testified that her administration of FSTs to Kosch differed from her NHTSA training in several ways. During the HGN, Kosch was facing a police cruiser with flashing emergency lights at points, was told to tilt his head down, the speed of her checks for equal tracking, lack of smooth, pursuit, and distinct and sustained nystagmus at maximum deviation were substantially quicker than her NHTSA FST training.[16] On the WAT, Ludlum did not instruct Kosch to imagine a straight line,

[10] R. 88:5.
[11] R. 88:13–14.
[12] R. 88:15.
[13] R. 88:8–8.
[14] R. 88:8–11.
[15] R. 88:16–17.
[16] R. 88:16–36.

counted a clue of starting too soon even though she had not yet provided the corresponding instruction, and failed to instruct Kosch to watch his feet or count his steps out loud during the test.[17] On the OLS, Ludlum did not instruct Kosch to keep his legs straight while performing the test.[18] Kosch volunteered that he had diabetes and issues with his back, knees, ankles, and hips after the WAT, and Ludlum only followed up on this information after hearing Kosch mention it.[19] The trial court agreed that the evidence supporting the stop was scant, and that there were deficiencies with the administration of FSTs, but ultimately found reasonable suspicion to support the traffic stop, probable cause to request a PBT, and probable cause to arrest.[20]

Kosch subsequently filed a motion to reconsider the trial court's denial of the motion to suppress based on reasonable suspicion for the stop,[21] as well as a motion to suppress and to declare Wisconsin's implied consent statute unconstitutional.[22] The Court set a briefing schedule, whereafter both parties submitted their arguments on the constitutional challenge in written form.[23] On March 29, 2022,[24] the trial court denied Kosch's motion to reconsider and the motion to declare Wisconsin's implied consent statute unconstitutional, and issued a written order entering this ruling on April 8, 2022.[25]

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[17] R. 88:16-46.
[18] R. 88:46–49.
[19] R. 88:24, 46, 48.
[20] R. 88:59–70.
[21] R. 44:1–3.
[22] R. 45:1.
[23] R. 47:1.
[24] R. 90:1–13.
[25] R. 60:1.

Kosch's case then proceeded to a jury trial on the OWI citation and to a court trial on the refusal matter.[26] The City presented Kosch's refusal to submit to the evidentiary breath test as evidence at trial, and argued to the jury that it was consciousness of guilt evidence.[27] In the Plaintiff's rebuttal to defense counsel's closing argument, the plaintiff's attorney made the following closing argument to the jury:

> **The defense is suggesting that you should find the defendant not guilty, but you have to look at what that entails. OWIs are a huge problem in our state and our country, causing injuries and deaths every single year.** Officer Ludlum did a fantastic job investigating this situation and ultimately placing the defendant, Douglas Kosch, under arrest for operating while under the influence. **Enforcement of operating under the influence is not complete until those who violate those laws are found guilty.** Therefore, I'm asking you – **I'm asking that you complete that process and find the defendant, Douglas Kosch, guilty of operating under the influence.**[28]

Immediately after closing arguments, defense counsel requested a sidebar and objected to the plaintiff's closing arguments.[29] After the sidebar, the trial court provided included the following in its closing instructions to the jury:[30]

> I'm simply going to preface my remarks by simply saying that these jury instructions are important and obviously the laws in our state are important. It's important that you consider this case only based on the laws that exist in our state and not based on any emotion. Regardless of whether we do or do not have an OWI problem or -- in this state or in this county, that's not something you should or can consider in determining the guilt or innocence of the defendant here today. You're to look solely at the facts of this case and ultimately make findings regarding what you believe the facts are, apply the law that I'm going to give you to those facts in these instructions and then base your verdict solely on the facts and the law as you find -- the law as I give to you. . . .
>
> It is your duty to follow all of these instructions. Regardless of any opinion you may have about what the law is or ought to be, you must base your verdict on the law I give you in these instructions. Apply that law to the facts in the case which have been properly proven by the evidence. Consider only the evidence received during this trial and the law as given to you by these instructions and from these alone, guided by your soundest reason and best judgment, reach your verdict. . . .
>
> Remarks of the attorneys are not evidence. If the remarks suggested certain facts not in evidence, disregard the suggestion. Consider carefully the closing arguments of the attorneys, but their arguments and conclusions and opinions are not evidence. Draw your own conclusions from the

[26] R. 91:1; R. 92:2.
[27] R. 92:152.
[28] R. 92:158–159.
[29] R. 92:159.
[30] R. 92:159–165.

> evidence, and decide upon your verdict according to the evidence, under the instructions given you by the court.

Following these jury instructions defense counsel placed the objections to the plaintiff's closing argument on the record and the court addressed what additional curative instructions might be necessary.[31] Defense counsel moved for a mistrial and dismissal with prejudice, on the grounds that the remarks commented on matters which were not in evidence, appealed to the jurors passions and sympathies, asked the jurors to assume the role of law enforcement, and that they were unfairly prejudicial.[32] The trial court acknowledged that some of the arguments made by the plaintiff's attorney were "problematic," that the argument that OWI enforcement is not complete until a finding of guilt was "an improper argument," "an appeal to emotion," and that the court was "troubled" by the City's statements in closing.[33] However, the trial court held that it provided curative instructions sufficient to mitigate any prejudice caused by the remarks, and denied Kosch's motions for mistrial and dismissal with prejudice.[34] Defense counsel suggested additional curative instructions specifically dealing with the plaintiff's argument that the jury should assume the role of law enforcement, but the trial court disagreed with defense counsel's characterization of those closing remarks and no additional instructions specifically tailored to the objection were given.[35]

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[31] R. 92:174–177.
[32] R. 92:172–174.
[33] R. 92:175–177.
[34] R. 92:177.
[35] R. 92:170–179.

Kosch was found guilty of the OWI by the jury, and Kosch's refusal was found to be unreasonable by the trial court.[36] The court ordered that Kosch's license be revoked for a period of months, that he pay forfeiture and costs on the OWI citation, and that he be subject to an ignition interlock order on the refusal citation.[37] A written order imposing the aforementioned penalties was signed and entered by the trial court on May 10, 2022.[38] Kosch now appeals the denial of his motion to suppress, motion to reconsider, constitutional challenge to the implied consent statute, the finding that his refusal was unreasonable, and the trial court's denial of his motion for mistrial.

ARGUMENT

I. THE TRIAL COURT ERRED BY DENYING KOSCH'S MOTION TO SUPPRESS AND MOTION TO RECONSIDER

An order granting or denying a suppression motion presents a question of constitutional fact.[39] This is a mixed question of law and fact where challenges to the circuit court's findings of historical fact are reviewed under the clearly erroneous standard, and courts review independently the application of those facts to constitutional principles."[40] To prevail on a motion for reconsideration, the movant must present either newly discovered evidence or establish a manifest error of law or fact.[41]

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[36] R. 92:147, 182.
[37] R. 92:187.
[38] R. 75:1.
[39] ***State v. Howes***, 2017 WI 18, ¶17, 373 Wis. 2d 468, 893 N.W.2d 812.
[40] ***State v. Abbott***, 2020 WI App 25, ¶ 10, 392 Wis. 2d 232, 242, 944 N.W.2d 8, 13. ***State v. Scull***, 2015 WI 22, ¶ 16, 361 Wis. 2d 288, 298, 862 N.W.2d 562, 566.
[41] ***Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.***, 2004 WI App 129, ¶ 44, 275 Wis. 2d 397, 416, 685 N.W.2d 853, 862.

To conduct an investigative stop, the police must have "reasonable, articulable suspicion that criminal activity is afoot."[42] Reasonable suspicion must be founded on concrete, particularized facts warranting suspicion of a specific individual, not " 'inchoate and unparticularized suspicion[s] or hunch[es].'[43] Courts assess reasonable suspicion in light of the totality of the circumstances.[44] The Supreme Court of Wisconsin has used the following factors in this determination: (1) the particularity of the description of the offender or the vehicle in which he fled; (2) the size of the area in which the offender might be found, as indicated by such facts as the elapsed time since the crime occurred; (3) the number of persons about in that area; (4) the known or probable direction of the offender's flight; (5) observed activity by the particular person stopped; and (6) knowledge or suspicion that the person or vehicle stopped has been involved in other criminality of the type presently under investigation.[45]

The evidence presented at the hearing was that Ludlum: (1) responded to a complaint at a motel for a "domestic incident between a male and a female," (2) that police were looking for a vehicle that was possibly leaving the area and that she observed the suspect vehicle leaving the area, (3) police dispatch or another officer provided a description of the suspect vehicle she had observed, and a motel employee pointed out a dark colored SUV in the parking lot.[46] Ludlum followed the vehicle, observing no traffic

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[42] ***State v. Richey***, 2022 WI 106, ¶ 9, 405 Wis. 2d 132, 139 (citing ***Illinois v. Wardlow***, 528 U.S. 119, 123, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000)).
[43] *Id.*
[44] *Id.*
[45] ***State v. Guzy***, 139 Wis. 2d 663, 676–77, 407 N.W.2d 548, 554 (1987).
[46] R. 88:5, 13–15.

violations, and pulled it over.[47] No evidence was presented by the City at the hearing regarding the make, model, or license plate of the suspect vehicle or whether the police description of the suspect vehicle matched the motel employee's description. No evidence was presented at the hearing regarding whether the suspect was a male or female, what the suspect looked like, who reported the alleged incident to police, or what allegations formed the basis of the reported "domestic incident."

In situations where the plaintiff is relying on the collective knowledge of others to justify an officer's traffic stop, the plaintiff must prove the collective knowledge that supports the stop.[48] In *State v. Pickens*, the Court of Appeals held that this burden cannot be met by only providing the testimony of one officer that they relied on the unspecified knowledge of other officers.[49] Here, the City relied on the collective knowledge of other members of law enforcement that there was an unspecified "domestic incident" as the sole justification for the stop, as Ludlum did not testify to observing any unlawful behavior by Kosch before stopping him. These conclusory assertions did not set forth any specific articulable facts for the court to apply the reasonable suspicion standard at the motion hearing. In *Pickens*, an officer testified to placing the defendant in handcuffs during an investigatory detention based on his prior observation of a police bulletin stating that the defendant was a suspect in a shooting incident.[50] The allegations at the motion hearing in Kosch's case were comparatively far less suspicious as the shooting allegations in *Pickens*,

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[47] R. 88:5, 13–15.
[48] ***State v. Pickens***, 2010 WI App 5, ¶ 13, 323 Wis. 2d 226, 235, 779 N.W.2d 1, 5.
[49] *Id.*
[50] *Id.* at 232.

at a minimum, described the unlawful conduct the defendant was suspected of whereas the allegations at Kosch's motion hearing did not. As in *Pickens*, collective knowledge of only conclusory allegations that a particular vehicle is associated with an unspecified "domestic incident," is not sufficient to support reasonable suspicion of any illegal behavior.[51]

To request a PBT, law enforcement must have "probable cause to believe" that the driver has committed an impaired driving offense.[52] The term "probable cause to believe," required to request a PBT, has been interpreted by the Wisconsin Supreme Court to require a lower standard of probable cause than the degree of probable cause required for a warrantless arrest.[53] Warrantless arrests are unlawful unless they are supported by probable cause.[54] Probable cause to arrest refers to that quantum of evidence within the officer's knowledge at the time of the arrest that would lead a reasonable law enforcement officer to believe that the defendant had committed an impaired driving offense.[55] In determining whether probable cause exists, courts examine the totality of the circumstances and consider whether the officer had "facts and circumstances within his or her knowledge sufficient to warrant a reasonable person to conclude that the defendant . . . committed or [was] in the process of committing an offense."[56]

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[51] *Id.* at 235 ("Such testimony provides no basis for the court to assess the validity of the police suspicion—it contains no specific, articulable facts to which the court can apply the reasonable suspicion standard.").
[52] ***Cnty. of Jefferson v. Renz***, 231 Wis. 2d 293, 309, 603 N.W.2d 541, 548–49 (1999).
[53] *Id.* 320–321 (J. Abrahamson concurring).
[54] ***State v. Blatterman***, 2015 WI 46, ¶¶ 33–35, 362 Wis. 2d 138, 164, 864 N.W.2d 26, 38.
[55] *Id.*
[56] *Id.*

Based on Ludlum's deficient administration of FSTs to Kosch, the trial court should not have given any evidentiary weight to the field sobriety test results.[57] Accordingly, the trial court's findings that 2 out of the 6 clues could be properly considered on the HGN, as well as the entirety of the WAT and OLS, were clearly erroneous. With Ludlum's SFST observations accorded no evidentiary weight, there was not probable cause to believe that Kosch had committed any impaired driving offense, rendering the PBT request unlawful.[58]

Further, Wisconsin case law which permits the use of PBT refusals to justify warrantless arrests is superseded by longstanding U.S. Supreme Court case law, as well as case law from the Supreme Court of Wisconsin, that a refusal to cooperate with a police investigation cannot be used to support a search or seizure decision.[59] Therefore, the trial court's consideration of the PBT refusal as consciousness of guilt evidence was also clearly erroneous. With the FST observations and PBT refusal excluded, probable cause to arrest did not exist under the totality of the circumstances. Therefore, the trial court erred in denying Kosch's motion to suppress and motion to reconsider its holding that the traffic

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[57] *See* ***City of W. Bend v. Wilkens***, 2005 WI App 36, ¶¶ 22–24, 278 Wis. 2d 643, 654–55, 693 N.W.2d 324, 329–30 (deficiencies in administration of FSTs affects the weight of the evidence).

[58] *See* ***Renz***, 231 Wis. 2d at 314.

[59] ***Fla. v. Bostick***, 501 U.S. 429, 437, 111 S. Ct. 2382, 2387–88, 115 L. Ed. 2d 389 (1991) ("[A] refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure."); ***I.N.S. v. Delgado***, 466 U.S. 210, 216–17, 104 S. Ct. 1758, 1762–63, 80 L. Ed. 2d 247 (1984) ("But if the persons refuses to answer and the police take additional steps . . . to obtain an answer, then the Fourth Amendment imposes some minimal level of objective justification to validate the detention or seizure."); ***Fla. v. Royer***, 460 U.S. 491, 498, 103 S. Ct. 1319, 1324, 75 L. Ed. 2d 229 (1983) ("He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds."); ***State v. Griffith***, 2000 WI 72, ¶ 52, 236 Wis. 2d 48, 69, 613 N.W.2d 72, 82 (citing ***Bostick,*** 501 U.S. at 437) ("His refusal to answer also would not have given rise to any reasonable suspicion of wrongdoing.").

stop was supported by reasonable suspicion. This Court should reverse those orders and remand the matter with instructions to grant those motions.

II. THE TRIAL COURT ERRED BY DENYING KOSCH'S MOTION TO DECLARE WISCONSIN'S IMPLIED CONSENT STATUTE UNCONSTITUTIONAL

Challenges to the constitutionality of a statute presents a question of law which receives *de novo* review.[60] Statutes are presumed to be constitutional, and the party challenging a statute as unconstitutional generally must prove that it is unconstitutional beyond a reasonable doubt.[61] To challenge a law as being unconstitutional on its face, the challenger must prove that the law cannot be enforced under any circumstances.[62] To challenge a law as being unconstitutional as applied to the facts of a case, the challenger must show that their constitutional rights were violated.[63] A court loses subject matter jurisdiction over proceedings where the underlying statute is found to be unconstitutional.[64]

Breath tests and blood draws are searches under the Fourth Amendment to the United States Constitution.[65] Searches without a warrant are presumptively unreasonable under the Fourth Amendment.[66] Voluntary consent is one "established and well-delineated exceptio[n]" to the warrant requirement.[67] Voluntary consent must be "'an essentially free

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[60] ***Matter of Commitment of C.S.***, 2020 WI 33, ¶ 13, 391 Wis. 2d 35, 44, 940 N.W.2d 875, 879.
[61] ***State v. Wood***, 2010 WI 17, ¶¶ 15-17, 323 Wis. 2d 321, 338, 780 N.W.2d 63, 71; ***State v. Prado***, 2021 WI 64, ¶¶ 12-19, 397 Wis. 2d 719, 960 N.W.2d 869, 873.
[62] ***Wood***, 323 Wis. 2d at 336.
[63] *Id.* at 337. ("If a challenger successfully shows that such a violation occurred, the operation of the law is void as to the party asserting the claim.").
[64] ***State ex rel. Skinkis v. Treffert***, 90 Wis. 2d 528, 537, 280 N.W.2d 316, 320 (Ct. App. 1979).
[65] ***Birchfield v. North Dakota***, 579 U.S. 438, 455, 136 S. Ct. 2160, 2173, 195 L. Ed. 2d 560 (2016); ***Schmerber v. California***, 384 U.S. 757, 767–68, 86 S. Ct. 1826, 1834, 16 L. Ed. 2d 908 (1966).
[66] ***Arizona v. Gant***, 556 U.S. 332, 338, 129 S. Ct. 1710, 1716, 173 L. Ed. 2d 485 (2009).
[67] ***State v. Prado***, 2020 WI App 42, ¶¶ 10–12, 393 Wis. 2d 526, 535, 947 N.W.2d 182, 186–87 (citing ***Schneckloth v. Bustamonte***, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973)).

and unconstrained choice,' not 'the product of duress or coercion, express or implied.'"[68] It is not enough to show mere "acquiescence to a claim of lawful authority."[69] The test to determine voluntariness of consent is in practice an objective one, measured from the perspective of an objectively reasonable person in the accused's position, which examines the totality of the circumstances and requires consideration of an accused's constitutional right to refuse to provide voluntary consent to a search or seizure.[70]

Wisconsin's implied consent statute requires that any driver arrested on suspicion of impaired driving must be advised of the following information by the arresting officer:[71]

> 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 . . . 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 a driver refuses to provide consent to a chemical test after being properly read the implied consent warnings, such evidence may be introduced against the accused at a trial as consciousness of guilt evidence.[72] Wisconsin's implied consent law authorizes officers who have lawfully arrested an accused for impaired driving, to offer the driver the following choices: (1) give consent to a breath or blood alcohol test, or (2) refuse the request for chemical testing and suffer the legal penalties including the revocation of their

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[68] ***State v. Blackman***, 2017 WI 77, ¶¶ 56–59, 377 Wis. 2d 339, 362, 898 N.W.2d 774, 785.
[69] ***State v. Reed***, 2018 WI 109, ¶¶ 57–60, 384 Wis. 2d 469, 491, 920 N.W.2d 56, 66–67; *see also* ***State v. Munroe***, 2001 WI App 104, ¶¶ 9–11, 244 Wis. 2d 1, 11, 630 N.W.2d 223, 227.
[70] ***State v. Luebeck***, 2006 WI App 87, ¶¶ 11–14, 292 Wis. 2d 748, 757–58, 715 N.W.2d 639, 643–44; ***United States v. Drayton***, 536 U.S. 194, 206–07, 122 S. Ct. 2105, 2113–14, 153 L. Ed. 2d 242 (2002); ***Schneckloth***, 412 U.S. at 227.
[71] Wis. Stat. § 343.305(4).
[72] ***State v. Crandall***, 133 Wis. 2d 251, 257, 394 N.W.2d 905, 907 (1986).

driving privileges, the imposition of an ignition interlock order, and the evidentiary consequence of their refusal being used at an OWI trial as consciousness of guilt evidence.[73] The Wisconsin Court of Appeals has held that: "when this choice is offered under statutorily specified circumstances that pass constitutional muster, choosing the first option is voluntary consent."[74] This means that Wisconsin's implied consent statute punishes an accused for exercising their constitutional right to refuse to provide voluntary consent to a warrantless government search.

The privilege against self-incrimination and corresponding right to remain silent are constitutional rights guaranteed by both art. I, sec. 8, Wis. Const.,[75] and by the U.S. Const., amend. V, which is made applicable to the states by reason of the due process clause of the Fourteenth Amendment.[76] The Self-Incrimination Clause to the Fifth Amendment of the United States Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."[77] The privilege may be invoked whenever "a witness has a real and appreciable apprehension that the information requested could be used against him in a criminal proceeding."[78] The Supreme Court of Wisconsin has held that a person is entitled to the protection of the Fifth Amendment right to remain silent prior to

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[73] ***State v. Padley***, 2014 WI App 65, ¶ 27, 354 Wis. 2d 545, 565, 849 N.W.2d 867, 876, *overruled by* ***State v. Brar***, 2017 WI 73, ¶ 27, 376 Wis. 2d 685, 702, 898 N.W.2d 499, 508; ***Prado***, 397 Wis. 2d at 960 (holding that implied consent is not actual consent, in contrast to the prior holding from *Brar*).
[74] *Id.*
[75] Wis. Const. art. I, § 8(1).
[76] ***State v. Marks***, 194 Wis. 2d 79, 89, 533 N.W.2d 730, 732 (1995); ***State v. Hall***, 207 Wis. 2d 54, 67–68, 557 N.W.2d 778, 783 (1997).
[77] U.S. Const. amend. V.
[78] ***Matter of Grant***, 83 Wis. 2d 77, 81, 264 N.W.2d 587, 590 (1978).

arrest and in non-custodial interrogations, and that it is constitutional error for the prosecution to comment on a non-testifying criminal defendant's silence at trial.[79]

A refusal need not be verbal under the statute, and may be inferred from the conduct of the accused.[80] Generally, any conduct that is "uncooperative" or conduct that "prevents an officer from obtaining" an evidentiary chemical test is legally deemed a refusal.[81] A refusal occurs anytime an accused fails to "promptly submit" to chemical testing after being properly informed of their rights under the statute.[82] Given this statutory scheme, and the case law interpreting the implied consent statute, an accused invoking their right to remain silent and standing mute would legally result in a refusal because it would constitute uncooperative conduct which prevents an officer from obtaining a chemical test and a failure to promptly submit to chemical testing.[83] Wisconsin's implied consent law therefore prospectively threatens to punish criminal defendants for exercising their right to remain silent when an officer asks them if they will submit to a chemical test after arrest.

On its face, Wisconsin's implied consent law prospectively threatens to punish people for exercising their Fourth Amendment right to refuse to provide voluntary consent, and their Fifth Amendment right to remain silent without penalty in criminal cases. Wisconsin courts have recently commented that civil penalties and evidentiary

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[79] ***State v. Fencl***, 109 Wis. 2d 224, 237–38, 325 N.W.2d 703, 711–12 (1982).
[80] ***State v. Reitter***, 227 Wis. 2d 213, 234–35, 595 N.W.2d 646, 656–57 (1999).
[81] *Id.* ("[I]t is the reality of the situation that must govern, and a refusal in fact, regardless of the words that accompany it, can be as convincing as an express verbal refusal.").
[82] ***State v. Rydeski***, 214 Wis. 2d 101, 109, 571 N.W.2d 417, 420 (Ct. App. 1997).
[83] *Id.*; ***Reitter***, 227 Wis. 2d at 234–35; ***State v. Neitzel***, 95 Wis. 2d 191, 205, 289 N.W.2d 828, 835 (1980).

consequences are permissible for violations of the implied consent statute.[84] However, no Wisconsin court has addressed whether the rule announced by the U.S. Supreme Court in *Griffin v. California* has been rendered applicable to the implied consent statute as a result of recent U.S. Supreme Court decisions on impaired driving cases.

In *Griffin v. California*, the United States Supreme Court held that a prosecutor's comment on a defendant's refusal to testify violated the Fifth Amendment privilege against self-incrimination.[85] *Griffin* further held that courts are prohibited by the Fifth Amendment from imposing "penalt[ies] for exercising a constitutional privilege,"[86] including the right to remain silent.[87] Where the prosecutor asks the trier of fact to draw an adverse inference from a defendant's silence in a criminal case, *Griffin* holds that the privilege against compulsory self-incrimination is violated.[88]

The U.S. Supreme Court held in 1983, in *South Dakota v. Neville*, that the rule from *Griffin* did not apply to implied consent laws on the grounds that there was no constitutional right to refuse to consent to a blood alcohol test.[89] Since *Neville*, the U.S. Supreme Court

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[84] ***State v. Levanduski***, 2020 WI App 53, ¶ 14, 393 Wis. 2d 674, 684–85, 948 N.W.2d 411, 417; ***State v. Forrett***, 2022 WI 37, ¶ 8, 401 Wis. 2d 678, 686–87 n. 5, 974 N.W.2d 422, 426.
[85] ***Griffin***, 380 U.S. at 614–15.
[86] *Id.* at 614 ("[C]omment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice . . . which the Fifth Amendment outlaws. It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly.").
[87] ***Portuondo v. Agard***, 529 U.S. 61, 69, 120 S. Ct. 1119, 1125, 146 L. Ed. 2d 47 (2000) ("*Griffin* prohibited comments that suggest a defendant's silence is 'evidence of guilt.'").
[88] ***United States v. Robinson***, 485 U.S. 25, 32, 108 S. Ct. 864, 868–69, 99 L. Ed. 2d 23 (1988); ***State v. Denson***, 2011 WI 70, ¶¶ 50-56, 335 Wis. 2d 681, 701–02, 799 N.W.2d 831, 841–42 ([T]he Fifth Amendment . . . forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt.").
[89] ***S. Dakota v. Neville***, 459 U.S. 553, 560 n. 10, 103 S. Ct. 916, 920–21, 74 L. Ed. 2d 748 (1983).

has held that blood and breath alcohol tests are searches under the Fourth Amendment.[90] That court has consistently held that a person always has the right to refuse to provide voluntary consent to a warrantless government search and seizure, including after the decision in *Neville* was rendered.[91] In *Birchfield v. North Dakota*, that court held that it is unconstitutional to impose criminal penalties for refusing a warrantless blood alcohol test.[92] *Birchfield* established that there is always a constitutional right to refuse to consent to a blood alcohol test.

The Supreme Court of Wisconsin held in *State v. Dalton* that *Neville*'s prior rationale that there was no constitutional right to refuse a blood alcohol test had been "superseded" by *Missouri v. McNeely* and *Birchfield v. North Dakota*.[93] Given this sea change in Fourth Amendment impaired driving law, *Neville*'s rationale for holding *Griffin* inapplicable to implied consent laws no longer exists. The *Griffin* rule now applies to Wisconsin's implied consent statute, meaning that it is unconstitutional for the implied consent statute to punish an accused with civil penalties and evidentiary consequences for

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[90] ***Skinner v. Ry. Lab. Executives' Ass'n***, 489 U.S. 602, 616–17, 109 S. Ct. 1402, 1412–13, 103 L. Ed. 2d 639 (1989); ***Missouri v. McNeely***, 569 U.S. 141, 148, 133 S. Ct. 1552, 1558, 185 L. Ed. 2d 696 (2013); ***Birchfield***, 579 U.S. at 455.

[91] ***Schneckloth***, 412 U.S. at 231; ***Royer***, 460 U.S. at 498; ***Bostick***, 501 U.S. at 437; ***Ohio v. Robinette***, 519 U.S. 33, 39–40, 117 S. Ct. 417, 421, 136 L. Ed. 2d 347 (1996); ***Georgia v. Randolph***, 547 U.S. 103, 114–16, 126 S. Ct. 1515, 1523–24, 164 L. Ed. 2d 208 (2006).

[92] ***Birchfield***, 579 U.S. at 441–42.

[93] ***State v. Dalton***, 2018 WI 85, ¶ 61, 383 Wis. 2d 147, 173 n. 10, 914 N.W.2d 120, 132 ("Chief Justice Roggensack's dissent's reliance on *South Dakota v. Neville* . . . is misplaced. *Neville* was decided pre-*McNeely* and pre-*Birchfield*. Both *McNeely* and *Birchfield* have had a significant effect on drunk driving law, and highlight the constitutional nature of a blood draw. Both cases analyze breath and blood tests as Fourth Amendment searches and appear to supersede the statement from the Fifth Amendment *Neville* case on which Chief Justice Roggensack's dissent relies.).

asserting their Fourth Amendment right to refuse to provide voluntary consent to a search and their Fifth Amendment right to remain silent during police questioning.[94]

Beyond *Griffin*, U.S. Supreme Court precedent has repeatedly condemned and prohibited the practice of punishing individuals for the exercise of constitutional rights. In *Garrity v. State of New Jersey*, a state statute required police officers to cooperate with state investigations of fixing traffic tickets or the officer would be subject to removal from office and the loss of their pension.[95] The *Garrity* Court held that the statute unconstitutionally coerced the statements made by the officers during the course of the investigation pursuant to that statute, recalled precedent prohibiting punishing individuals for the assertion of constitutional rights, and stated the following:[96]

> **There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price.** Engaging in interstate commerce is one . . . Resort to the federal courts in diversity of citizenship cases is another . . . Assertion of a First Amendment right is still another . . . The imposition of a burden on the exercise of a Twenty-fourth Amendment right is also banned . . . **We now hold the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office**, and that it extends to all . . .

Individuals have the constitutional right to refuse to provide voluntary consent to any warrantless government search under the Fourth Amendment, which includes breath alcohol tests, and the right to remain silent when asked by police if they will submit to chemical tests for intoxication. Punishing individuals for refusing to provide voluntary consent to a search by revoking and restricting their driving privileges is analogous to the unconstitutional civil penalties in *Garrity*. Imposing evidentiary consequences for asserting

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[94] ***Griffin***, 380 U.S. at 614–15.
[95] ***Garrity v. State of N.J.***, 385 U.S. 493, 494, 87 S. Ct. 616, 617, 17 L. Ed. 2d 562 (1967).
[96] *Id.* at 620.

these constitutional rights is analogous to the unconstitutional penalty in *Griffin*. The threat of removal from public office for asserting the Fifth Amendment privilege condemned in *Garrity*, and the threat of using a criminal defendant's silence as consciousness of guilt evidence condemned in *Griffin*, is analogous to the penalties imposed under Wisconsin's implied consent law for asserting the Fourth Amendment right to refuse to provide voluntary consent or the right to refuse to answer police questions.

Wisconsin's implied consent law prospectively threatens to punish an accused for exercising either right, making it unconstitutional on its face beyond a reasonable doubt.[97] Wisconsin's implied consent statute is also unconstitutional as applied to the facts of Kosch's case because he was punished with the imposition of civil penalties and evidentiary consequences for exercising his Fourth Amendment right to refuse to provide voluntary consent to Ludlum's request to submit to a warrantless breath alcohol test. The ruling of the trial court should be reversed, with instructions to grant Kosch's constitutional challenge to the implied consent statute and dismiss the refusal proceedings.

III. THE TRIAL COURT ERRED IN DENYING KOSCH'S MOTION FOR A MISTRIAL BASED ON IMPROPER CLOSING ARGUMENTS BY THE PLAINTIFF

A trial court's ruling regarding an objection to closing arguments will be affirmed unless there has been a misuse of discretion which is likely to have affected the jury's verdict.[98] A circuit court's exercise of discretion in ordering a mistrial is accorded a level

[97] *See* ***Forrett***, 401 Wis. 2d at 686–93 (holding that Wis. Stat. §§ 343.307(1) and 346.65(2)(am) were facially unconstitutional for prospectively threatening the imposition of criminal penalties for exercising the right to refuse to consent to a warrantless blood alcohol test).
[98] ***State v. Neuser***, 191 Wis. 2d 131, 136, 528 N.W.2d 49, 51 (Ct. App. 1995).

of deference that varies depending on the particular facts of the case. Regardless of the level of deference to be applied, an appellate court must, at a minimum, satisfy itself that the circuit court exercised sound discretion in its order regarding a request for a mistrial.[99] Because Kosch's mistrial motion was made on the basis of overreaching by the plaintiff, this court would give the trial court's ruling strict scrutiny.[100]

Here the City argued four main ideas to the jury in rebuttal: (1) you need to consider what a finding of not guilty "entails" or means for society, (2) OWI causes deaths and injuries all over our state and country, (3) enforcement of OWI laws is not complete until those arrested for OWI are found guilty and convicted, (4) you the jury need to complete this process of OWI enforcement by finding Kosch guilty of OWI. No evidence was presented at trial regarding deaths or injuries caused by OWI, whether in Wisconsin or nationwide, or how securing convictions after OWI arrests furthers the goals of OWI enforcement and deterrence. These closing remarks were improper because the amounted to commentary on matters which were not in evidence.[101]

The City impliedly argued that a verdict of not guilty would have consequences for society as a whole, and tethered this argument to another statement about how OWI causes deaths and injuries all over our state and country.[102] This boils down to a thinly veiled argument that if juries fail to convict people accused of OWI, in this case Kosch, that OWI offenders will be undeterred and more people would be injured and killed by impaired

[99] ***State v. Seefeldt***, 2003 WI 47, ¶ 13, 261 Wis. 2d 383, 393, 661 N.W.2d 822, 827.
[100] ***State v. Bunch***, 191 Wis. 2d 501, 507, 529 N.W.2d 923, 925 (Ct. App. 1995).
[101] ***Neuser***, 191 Wis. 2d at 142.
[102] R. 92:158–159.

drivers all across the country. This was an improper and blatant appeal to the emotions, passions, and sympathies of the jury. Moreover, this argument constituted reversible error because it informed the jury of a purported effect of a not guilty verdict towards OWI deterrence in a manner which affected Kosch's substantial rights.[103] The prejudice from these comments was compounded further when the City essentially asked the jury to step into the shoes of officers in OWI enforcement, by "completing that process" which Ludlum had started by stopping and arresting Kosch.[104]

The non-standard curative instructions provided by the trial court in response to defense counsel's objection to the remarks were that the jury should not consider whether OWIs are a matter of state or national importance. When a trial court gives a proper or sufficient curative instruction, appellate courts presume that the jury followed that instruction and acted in accordance with the law.[105] This presumption only exists where a proper or sufficient curative instruction is provided.[106] A curative instruction is improper and insufficient if it does not sufficiently identify the prejudicial evidence that the jury is to disregard and instruct the jury in clear terms that the jury must not consider that evidence,[107] or if it does not eliminate the potential prejudice caused by the objectionable

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[103] *See* ***Kobelinski v. Milwaukee & Suburban Transp. Corp.***, 56 Wis. 2d 504, 520, 202 N.W.2d 415, 425 (1972) (informing the jury of the effect of its answer to a question on a special verdict) ("The fundamental rule in this state is that it is reversible error for . . . counsel to inform the jury of the effect of their answer on the ultimate result of their verdict, especially if it appears that the error complained of has affected the substantial rights of the party seeking to revise or set aside the judgment, or secure the new trial.").
[104] R. 92:158–159.
[105] ***State v. Gary M.B.***, 2004 WI 33, ¶ 33, 270 Wis. 2d 62, 86–87, 676 N.W.2d 475, 488.
[106] *Id.* at 83–84.
[107] ***State v. Penigar***, 139 Wis. 2d 569, 581–82, 408 N.W.2d 28, 34 (1987).

remarks or evidence presented.[108] The curative instructions provided by the trial court were not proper or sufficient because they did not specifically address the plaintiff's statements that OWIs cause deaths and injuries, that deterrence of OWIs is achieved only when those accused of OWI such as Kosch are convicted, and that jurors needed to assume the role of law enforcement by convicting Kosch. Therefore, the curative instructions provided by the trial court did not cure the prejudice caused by the improper closing remarks.

Kosch was entitled to a trial based on the evidence of record, "unaffected by the statement of extrinsic facts or extraneous considerations."[109] The Supreme Court of Wisconsin stated over a century ago that an attorney arguing based on facts not in evidence:

> [T]ries his case upon unsworn statements and vilification, instead of evidence, and he obtains a verdict, if at all, based, in part at least, upon that which is not evidence, and which has no proper place in the trial.[110]

In Kosch's case the City presented a case with no bad driving, no chemical test result, and defectively administered FSTs. Wisconsin law permits dismissal of a civil action as a sanction for misconduct where a plaintiff has acted in bad faith or committed egregious acts of misconduct, which is shown when a plaintiff engages in "a conscious attempt to affect the outcome of the litigation or a flagrant, knowing disregard of the judicial process."[111] Despite the trial court instructing the jury to not consider matters other than the evidence, the plaintiff knowingly and egregiously undermined these orders by

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[108] ***State v. Davis***, 2006 WI App 23, ¶ 22, 289 Wis. 2d 398, 414, 710 N.W.2d 514, 522.
[109] ***Scott v. State***, 91 Wis. 552, 65 N.W. 61, 63 (1895).
[110] ***Sullivan v. Collins***, 107 Wis. 291, 83 N.W. 310, 313 (1900).
[111] ***Schultz v. Sykes***, 2001 WI App 255, ¶ 14, 248 Wis. 2d 746, 766, 638 N.W.2d 604, 612–13.

telling the jury to convict Kosch in order to help law enforcement prevent future injuries and deaths from impaired drivers.

The plaintiff's closing remarks in their totality demonstrated a conscious attempt to affect the outcome of the trial where the City was not able to present any evidence of a chemical test result, correctly administered FSTs, or poor driving. This error is not harmless because, absent the objectionable remarks, there is a reasonable probability that the jury would have acquitted Kosch of OWI had they not been made. Kosch has demonstrated that this misconduct rose to the level of bad faith warranting a sanction including dismissal with prejudice, and the trial court erred in failing to grant a mistrial and dismissal.[112] Given the circumstances, there exists a reasonable probability that Kosch would have been found not guilty of OWI absent the improper closing remarks. This Court should reverse the rulings of the trial court and remand the matters with instructions to dismiss the OWI citation with prejudice or, alternatively, to grant a new trial.

IV. THE TRIAL COURT ERRED IN FINDING KOSCH'S REFUSAL UNREASONABLE

Application of the implied consent statute to an undisputed set of facts is a question of law that is reviewed independently. Similarly, reconciling constitutional considerations of due process and equal protection with the requirements of the implied consent statute involve questions of law, which this court reviews independently. To the extent the circuit

[112] *See id.*

court's decision involves findings of evidentiary or historical facts, those findings will not be overturned unless they are clearly erroneous.[113]

The trial court erred by holding that Kosch's statement that he would not consent to a breath alcohol test without a lawyer constituted a legal refusal. In *State v. Baratka*, the Court of Appeals interpreted a prior implied consent decision of the Supreme Court of Wisconsin to hold that repeated requests for an attorney "can amount to a refusal as long as the officer informs the driver that there is no right to an attorney at that point."[114] Ludlum testified that Kosch said he would not consent to the breath test without a lawyer, and that she did not inform Kosch that he had no right to consult an attorney before making a decision regarding chemical testing.[115] Therefore, under *Baratka*, Kosch's statements would not constitute a legal refusal.

Finally, for the reasons previously argued regarding the trial court's denial of Kosch's motion to suppress and motion to reconsider, the trial court erred in finding Kosch's refusal to be unreasonable because Officer Ludlum lacked reasonable suspicion to stop, probable cause to request a PBT, and probable cause to arrest Kosch. Kosch's challenges to the legality of the traffic stop and the PBT request also constitute defenses on the merits to the refusal proceedings under *In re Refusal of Anagnos*.[116] Therefore, the order of the trial court should be reversed and remanded with an order to find Kosch's refusal legally reasonable on statutory grounds.

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[113] ***State v. Baratka***, 2002 WI App 288, ¶ 7, 258 Wis. 2d 342, 346–47, 654 N.W.2d 875, 877.
[114] *Id.* at 349–50.
[115] R. 92:98–99.
[116] ***In re Refusal of Anagnos***, 2012 WI 64, ¶ 4, 341 Wis. 2d 576, 580–81, 815 N.W.2d 675, 677 (citing ***Reitter***, 227 Wis. 2d at 235).

CONCLUSION

For the reasons stated in this Brief, the judgments of the trial court should be reversed, and this action be remanded to that court, with directions that the court dismiss the refusal proceedings on constitutional grounds or find the refusal reasonable, dismiss with prejudice or alternatively order a new trial on the operating while intoxicated citation, and grant Kosch's motions to suppress and reconsider.

Dated at Middleton, Wisconsin, March 13, 2023.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief produced using the following font:

Proportional serif font: Min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 8,905 words.

I further certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Dated: March 13, 2023.

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CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum:

(1) a table of contents;
(2) the findings or opinion of the circuit court; and
(3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notion that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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