STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2022AP800

CITY OF WHITEWATER,

Plaintiff-Respondent,

vs.

DOUGLAS E. KOSCH,

Defendant–Appellant.

REPLY 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,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Statutes Cited

Secondary Source Cited

ARGUMENT

I. MOTIONS TO SUPPRESS AND RECONSIDER

Ludlum lacked reasonable suspicion to stop Kosch for violating any law. *Neff* is distinguishable because *Neff* involved the officer being aware of the make and model of the suspect vehicle.[1] An unreported New Mexico Court of Appeals opinion in *City of Farmington v. Russell*, persuasive authority in that state, reached the opposite conclusion and stated:[2] "a 'domestic disturbance,' alone, is not a crime, nor does it give rise to reasonable suspicion that a crime has occurred." The logic from *Russell* applies to the facts from Kosch's suppression hearing where a "domestic incident,"[3] the circumstances of which were never established at that hearing, was the sole basis for the stop.

The City's community caretaker argument should be rejected because the City did not raise the argument in trial court.[4] The City argues that waiver should not apply because it will provide grounds for affirmance.[5] However, this Court has held that this rationale for avoiding the waiver rule "ought not to apply in a case . . . where further fact finding on the underlying question is necessary to a resolution of the issue."[6] Waiver should apply because the City's failure to raise the argument deprived Kosch of an opportunity to present

[1] ***State v. Neff***, No. 95-CA-1, 1995 WL 396487, at *2 (Ohio Ct. App. June 21, 1995).
[2] ***City of Farmington v. Russell***, A-1-CA-33293, mem. op., ¶¶ 2–3 (N.M. Ct. App. Apr. 9, 2014) (nonprecedential); NMRA, Rule 12-405.
[3] R. 88:4–5.
[4] ***State v. Van Camp***, 213 Wis. 2d 131, 144, 569 N.W.2d 577, 584 (1997).
[5] *See* ***State v. Holt***, 128 Wis. 2d 110, 124–25, 382 N.W.2d 679, 686–87 (Ct. App. 1985).
[6] ***State v. Milashoski***, 159 Wis. 2d 99, 109, 464 N.W.2d 21, 25 (Ct. App. 1990), *aff'd*, 163 Wis. 2d 72, 471 N.W.2d 42 (1991).

rebuttal evidence and for the trial court to make appropriate factual findings at the suppression hearing, and a remand would be necessary to allow for this to happen.[7]

If the Court declines to impose waiver, then the argument should be rejected on the merits using the three-pronged community caretaker test discussed in the City's brief.[8] The second prong is satisfied only where there is "an 'objectively reasonable basis' to believe [that] there is 'a member of the public who is in need of assistance.'" The third prong requires analyzing the additional factors discussed in the City's brief.[9] Ludlum's traffic stop was a seizure, but the City's argument fails the second prong of the test because the evidence at the suppression hearing did not establish any objectively reasonable basis for Ludlum to believe that there was a member of the public in need of assistance inside of Kosch's car. No evidence was presented at that hearing regarding whether there were loud noises, violent conduct, or any individual requesting assistance.[10]

Bies and *Kramer* are distinguishable because neither case addressed nondescript allegations of a domestic incident, and because the officer in *Bies* witnessed additional suspicious conduct before entering the curtilage.[11] *Short Bull* is distinguishable because the officer was aware that a woman had called a motel employee requesting help, and because the defense waived argument regarding the community caretaker exception.[12] This Court held in *State v. Durham*, a case with more suspicious facts than those at Kosch's

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[7] *Id.*
[8] ***State v. Maddix***, 2013 WI App 64, ¶ 16, 348 Wis. 2d 179, 189, 831 N.W.2d 778, 783.
[9] *Id.* at 198–99.
[10] *See id.* at 183–84.
[11] ***Bies v. State***, 76 Wis. 2d 457, 461–62, 471–72, 251 N.W.2d 461, 463–64, 468 (1977); ***State v. Kramer***, 2009 WI 14, ¶¶ 4–5, 315 Wis. 2d 414, 419–20, 759 N.W.2d 598, 601.
[12] ***State v. Short Bull***, 2019 S.D. 28, ¶¶ 2–3, 22, 928 N.W.2d 473, 474, 478–79.

suppression hearing, that the second and third prongs of the community caretaker exception were not met where officers were aware that a witness had reported hearing yelling and banging which shook the wall at her neighbor's residence, and were told by dispatch to investigate a "possible domestic incident."[13]

The City's argument also fails the third prong, as it failed to establish that exigent circumstances justified the stop. A "domestic incident," without more, would not furnish an officer with an objectively reasonable basis to believe that any exigency existed.[14] In *State v. Maddix*, the Supreme Court of Wisconsin discussed an exigency where police heard a woman screaming after being called to a residence for a report of a domestic disturbance.[15] The City did not present evidence at the suppression hearing that police made any observations prior to the stop which corroborated the allegations of a domestic incident, as in *Maddix*.[16] The City failed to prove, clearly and convincingly,[17] that the community caretaker exception applies.

The City concedes that mistakes were made in administering field sobriety tests (FSTs) to Kosch.[18] Further, the City does not respond to (thereby conceding) Kosch's arguments that his motion to reconsider was erroneously denied or that it was clearly erroneous for the trial court to consider Kosch's refusal of the preliminary breath test (PBT)

[13] ***State v. Durham***, No. 2015AP1978–CR, unpublished slip op. ¶¶ 3, 30–42 (WI App June 1, 2016).
[14] *Id.*
[15] ***Maddix***, 348 Wis. 2d at 189.
[16] *Id.* at 199.
[17] ***State v. Hay***, 2020 WI App 35, ¶ 11, 392 Wis. 2d 845, 852, 946 N.W.2d 190, 194.
[18] City's Brief, at 13.

in determining the legality of Kosch's arrest.[19] The evidence presented at the suppression hearing indicated that Ludlum observed no poor driving, no bloodshot glossy eyes or odor of intoxicants, and defectively administered FSTs. Given the clear deficiencies noted with Ludlum's administration of FSTs, the trial court's reliance on those tests to support the PBT and arrest decision was clearly erroneous. With the FSTs properly accorded minimal to no weight, the request for a PBT was unlawful for lack of probable cause. For those same reasons, excluding the PBT refusal, Kosch's arrest was illegal for lack of probable cause. Therefore, the trial court erred by denying Kosch's motion to suppress and his motion to reconsider its ruling on the legality of the stop.

II. CONSTITUTIONAL IMPLIED CONSENT CHALLENGE

Levanduski interpreted *McNeely* and *Birchfield* to hold that it is permissible to burden the Fourth Amendment right to refuse to consent to a blood draw in impaired driving cases with civil penalties and evidentiary consequences, but not criminal penalties.[20] *Levanduski* held that you could penalize the assertion of a constitutional right to a degree, whereas *Griffin v. California* and *Garrity v. New Jersey* held that it was impermissible to penalize the assertion of a constitutional right at all.[21] The City does not dispute that *Griffin* and *Garrity* remain precedential law.

Lemberger did not address whether changes in federal law rendered the imposition of civil penalties and evidentiary consequences for refusing warrantless chemical tests

[19] ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 108–09, 279 N.W.2d 493, 499 (Ct. App. 1979).
[20] ***State v. Levanduski***, 2020 WI App 53, ¶¶ 11–13, 393 Wis. 2d 674, 681–84, 948 N.W.2d 411, 415–16.
[21] ***Garrity v. State of N.J.***, 385 U.S. 493, 494, 87 S. Ct. 616, 617, 17 L. Ed. 2d 562 (1967).

unconstitutional. *Lemberger* held that counsel was not ineffective for failing to raise novel arguments challenging the use of breath test refusals at trial.[22] Kosch's case is distinguishable because Kosch has challenged the legality of his arrest, and has raised novel challenges to Wisconsin's implied consent law.[23]

McNeely and *Birchfield* were Fourth Amendment cases which did not rule on the legality of implied consent laws. The *McNeely* excerpt cited by the City cites to the Fifth Amendment case *South Dakota v. Neville*, and discusses the historical uses of implied consent laws.[24] The City's citation to *Birchfield* quotes the same passage from *McNeely* citing to *Neville*.[25] While this Court must consider the language from *McNeely* and *Birchfield*, the language is dicta because: (1) the constitutionality of implied consent laws was not a question germane to either case, (2) the language went beyond the facts of those cases, and (3) was broader than necessary and not essential to the determination of the issues in those cases.[26] It is clear that these passages are dicta following *Mitchell v. Wisconsin* where the U.S. Supreme Court did not cite to *McNeely* or *Birchfield* as having rendered any holding regarding implied consent laws while simultaneously citing other substantive implied consent cases.[27] Neither *McNeely* nor *Birchfield* addressed *Griffin*, or whether *Neville*'s holding regarding the application of *Griffin* to implied consent laws had been abrogated by their precedent that a person has a constitutional right to refuse a

[22] ***State v. Lemberger***, 2017 WI 39, ¶¶ 32–35, 374 Wis. 2d 617, 635–37, 893 N.W.2d 232, 241–42.
[23] *Id.*
[24] ***Missouri v. McNeely***, 569 U.S. 141, 160–61, 133 S. Ct. 1552, 1565–66, 185 L. Ed. 2d 696 (2013).
[25] ***Birchfield v. North Dakota***, 579 U.S. 438, 475–77, 136 S. Ct. 2160, 2185, 195 L. Ed. 2d 560 (2016).
[26] ***Zarder v. Humana Ins. Co.***, 324 Wis. 2d 325, 347–48, n. 19, 782 N.W.2d 682, 693 (2010).
[27] ***Mitchell v. Wisconsin***, 204 L. Ed. 2d 1040, 139 S. Ct. 2525, 2532–33 (2019).

warrantless blood test. *Birchfield* and *McNeely* have effectively abrogated *Neville* to the extent that the rule from *Griffin* is now applicable to implied consent statutes.[28]

Penalizing individuals with civil penalties and evidentiary consequences for exercising their constitutional right to refuse to consent to warrantless breath and blood tests would unconstitutionally cut down these rights by making their assertion costly.[29] The implied consent statute falls into the same class as other laws which have been found unconstitutional for burdening constitutional rights.[30] Kosch was forced to pay a price for asserting his right to refuse to consent to a breath test, and the statute threatens such punishment prospectively to anyone arrested on suspicion of an impaired driving offense. The statute is therefore unconstitutional facially and as applied to Kosch's case.

III. IMPROPER CLOSING ARGUMENTS BY THE PLAINTIFF

Mader and *Camacho* are inapposite because neither case involved a prosecutor commenting on any non-evidentiary matters or requesting the jury to consider deterrence and crime prevention in reaching their verdict.[31] *Mader* involved the prosecutor asking jurors to use their common experience and knowledge of sexual assault and delayed reporting in evaluating the credibility of a witness, which was held not to constitute commentary on non-evidentiary matters.[32] *Camacho* involved the prosecutor commenting on the defendant's trial testimony and arguing that it was not credible.[33]

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[28] ***S. Dakota v. Neville***, 459 U.S. 553, 560 n. 10, 103 S. Ct. 916, 920–21, 74 L. Ed. 2d 748 (1983).
[29] ***Griffin v. California***, 380 U.S. 609, 614–15, 85 S. Ct. 1229, 1232–33, 14 L. Ed. 2d 106 (1965).
[30] ***See v. City of Seattle***, 387 U.S. 541, 545–46, 87 S. Ct. 1737, 1740–41, 18 L. Ed. 2d 943 (1967).
[31] ***State v. Camacho***, 176 Wis. 2d 860, 885–86, 501 N.W.2d 380, 389–90 (1993).
[32] ***State v. Mader***, No. 2022AP382-CR, unpublished slip op., ¶¶59, 63 (WI App June 7, 2023).
[33] ***Camacho***, 176 Wis. 2d at 885–86.

No evidence was presented at Kosch's trial regarding: the prevalence of OWIs in in the state and country, statistics regarding injuries and fatalities attributed to OWIs, or the relationship between convictions for OWIs and deterrence of impaired driving in the community. The City concedes that part of its basis for referencing these non-evidentiary matters was to "sugges[t] . . . how important it is for [OWI] law to be enforced."[34] Enforcement of OWI laws was not relevant at trial as it did not relate to any of the elements of the charge, and was not a proper factor for the jury's consideration.[35] Further, the City cites no authority for its proposition that the term "law enforcement" includes a jury finding a person guilty.[36] Since an accused is legally presumed innocent, it would be equally reasonable to include a not guilty verdict as "law enforcement." The jury is not part of "law enforcement," which is defined in the Meriam Webster Dictionary as: the police.[37]

The objectionable argument was not a request to find Kosch guilty based on the evidence, but an argument for the jury to assume the role of police deterring future OWIs.[38] It was an explicit appeal to the jury to consider "what [finding Kosch not guilty] entails," from the City's perspective: incomplete enforcement of OWI laws, where OWIs are a "huge problem in our state and country," which would consequently lead to more "injuries and deaths" from undeterred impaired drivers.[39] This was an improper, prejudicial, and

[34] City's Brief, at 16, 19.
[35] ***Darden v. Wainwright***, 477 U.S. 168, 179–81, 106 S. Ct. 2464, 2471, 91 L. Ed. 2d 144 (1986).
[36] ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992).
[37] MIRRAM-WEBSTER DICTIONARY, *law enforcement*, https://www.merriam-webster.com/dictionary/law%20enforcement?utm_campaign=sd&utm_medium=serp&utm_source=jsonld.
[38] R. 92:158–159.
[39] R. 92:158–159.

inflammatory request for the jury to consider deterrence of future OWIs as a reason to find Kosch guilty while basing this consideration non-evidentiary matters, forms of argument that have been condemned by this Court and the U.S. Supreme Court.[40] The remarks so infected Kosch's trial with unfairness as to make his resulting conviction a denial of due process. The trial court erred in failing to grant Kosch's motions for mistrial based on improper closing arguments. This error was not harmless because there was a reasonable probability that the jury would have found Kosch not guilty of OWI absent the remarks.

IV. KOSCH'S REFUSAL WAS REASONABLE

State v. Baratka cited to *State v. Reitter* directly after it stated that "[r]epeated 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."[41] The City does not contest that *Baratka* remains precedential or that Kosch was not advised that he had no right to counsel after stating he refused without a lawyer. Under *Baratka*, Kosch's statements did not constitute a legal refusal.[42] For the reasons set forth in Kosch's suppression arguments, his refusal was also lawful because he was arrested without probable cause. Therefore, the trial court erred when it held that Kosch unlawfully refused a breath alcohol test.

CONCLUSION

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

[40] ***Wainwright***, 477 U.S. at 179–81; ***State v. Neuser***, 191 Wis. 2d 131, 142, 528 N.W.2d 49, 53–54 (Ct. App. 1995).
[41] ***State v. Baratka***, 2002 WI App 288, ¶ 15, 258 Wis. 2d 342, 349–50, 654 N.W.2d 875, 878 (citing ***State v. Reitter***, 227 Wis.2d 213, 235, 595 N.W.2d 646 (1999)).
[42] *Id.*

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, August 1, 2023.

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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:

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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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