STATE OF WISCONSIN COURT OF APPEALS DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

Appeal No. 2023 AP 000353

vs.

ALBERT A. TERHUNE.

Defendant-Appellant.

ON APPEAL FROM CONVICTIONS ENTERED ON
FEBRURARY 6, 2023 IN THE CIRCUIT COURT
FOR SAUK COUNTY, BRANCH 3,
THE HON. PATRICIA A. BARRETT, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

Michael X. Albrecht
District Attorney
Sauk County District Attorney's Office
515 Oak Street
Baraboo, WI 53913
(608) 355-3280
State Bar No. 1085008

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State is not requesting oral argument or publication.

STATEMENT OF THE FACTS

Additional facts relevant to the State's argument will be contained within the appropriate subsection.

ARGUMENT

Albert Terhune, Defendant-Appellant, challenges the Trial Court's findings on the motions to suppress and challenging the constitutionality of the implied consent statute. Further, Terhune challenges the Trial Court's finding that he improperly refused testing, on the basis that the officer lacked both the reasonable suspicion to expand the scope and "probable cause to believe" necessary to request a preliminary breath test noted in his motions to suppress, and also lacked the overall probable cause to arrest. The State maintains that Trooper De Anda had the requisite level of cause needed at stage of the interaction with Terhune and the implied consent statute is constitutional.

WIS. STAT. § 343.305(9)(a)5 outlines the issues subject to the refusal hearing to be limited to, in relevant part:

a) Whether the officer had probable cause to believe the person was operating a motor vehicle while under the influence of alcohol ("OWI") and whether the person was lawfully placed under arrest for a violation of the OWI statutes.
b) Whether the officer read the information contained in WIS. STAT. § 343.305(4).
c) Whether the person refused to permit the test.

Subsections (b) and (c) are not at issue in this appeal. *In re Anagnos*, 2012 WI 64, ¶ 42, 341 Wis. 2d 576, 815 N.W.2d 675, held that the "lawfully placed under arrest" language of sub (a) meant that "the circuit court may entertain an argument that the arrest was unlawful because the traffic stop that preceded it was not justified by probable cause or reasonable suspicion." Terhune makes that argument now, by way of attacking the officer's expansion of the scope of the traffic stop and the PBT request. He also challenges the court's overall finding of probable cause, which is just an extension of the previous arguments, and challenges the constitutionality of the implied consent statute.

I. Ample Reasonable Suspicion Existed to Extend the Traffic Stop and the Trial Court's Finding Should be Upheld

Terhune asserts that Trooper "De Anda lacked reasonable suspicion of impairment at the time he expanded the stop to question Terhune about drinking" and thus the Trial Court erred in denying his motion to suppress. In order to justify an investigatory seizure, the police must have a reasonable suspicion, grounded in specific articulable facts and reasonable inferences from those facts, that an individual is or was violating the law. *State v. Colstad,* 2003 WI App 25, ¶ 8, 260 Wis.2d 406, 659 N.W.2d 394 (*internal quotations and citations omitted*). "The question of what constitutes reasonable suspicion is a common sense test: under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience." *Id. (citations omitted)*. During a traffic stop, "[t]he scope of the officer's inquiry, or

the line of questioning, may be broadened beyond the purpose for which the person was stopped only if additional suspicious factors come to the officer's attention – keeping in mind that these factors, like the factors justifying the stop in the first place, must be 'particularized' and 'objective.'" *State v. Betow*, 226 Wis. 2d 90, 94, 593 N.W.2d 499 (Ct. App. 1999) *citing United States v. Perez*, 37 F.3d 510, 513 (9th Cir.1994).

Trooper De Anda had the following specific and articulable facts when he questioned Terhune regarding drinking:

- Speeding 85 in 70 mph zone (58:14).
- Odor of intoxicants from vehicle (58:15-16).
- Odor of cologne or perfume, which is sometimes used as a masking agent (58:16).
- Coming from ax throwing, which Trooper De Anda knew to typically involves alcohol (58:16).
- Slow dexterity in presenting insurance through his phone – slow fingers, which appeared unusual (58:17-18).
- Terhune leaned over passenger and dropped phone (58:18).
- Swaying motion as Terhune exited vehicle (58:18).

Information that would have been in front of Trooper De Anda, but he noticed after he reviewed his video more carefully later:

- Wide turn crossing two lanes into the turning lane at an intersection (58:14; 61:40).

Terhune makes much of this in his brief, suggesting that this amounts to a dramatic change in testimony and should call into question all of De Anda's testimony. But despite three hearings and rigorous cross examination on other issues, no record was developed about that issue being about dishonesty (61:40). What is known is that these facts were obviously in front of Trooper De Anda at the time because it is on the squad camera video. "[T]he fact that [an] officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *Ohio v. Robinette*, 519 U.S. 33, 38, 117 S.Ct 418 (1996) (*citing Whren v. United States*, 517 U.S. 806, 116 S.Ct. 1769 (1996) internal quotations omitted).

An additional factor that should be in the reasonable suspicion calculus is:

- Terhune initially denied drinking, then admitted to one cup of beer when confronted with odor of intoxicants from breath (60:11).

While the State conceded at the motion hearing that this represented an expansion of the scope of the traffic stop into an inquiry into alcohol related driving, this single question is not an unreasonable extension of the traffic stop. In *State v. Gaulrapp*, a traffic stop for loud muffler pivoted to a question about whether there were weapons or drugs in the vehicle. 207 Wis.2d 600, 603, 558 N.W.2d 696 (Ct.

App. 1996). The Court of Appeals held that the "detention was not unreasonably prolonged by the asking of one question." *Id.* at 609. In an unpublished opinion, the Court of Appeals affirmed a trial court's finding that that an "officer permissibly, and only minutely, expanded the scope of detention by asking [the driver] whether he had been drinking." *State v. Glover*, 2011 WI App 58, ¶ 15, 332 Wis. 2d 807, 798 N.W.2d 321. In *Glover*, the stop was at 1:19 a.m. for speeding 34 in a 25mph zone, with a slight odor of intoxicants coming from the cab that had 2 persons in it and Glover admitted coming from a bar. *Id.* ¶ 2-3.

Here, the facts available to the Trooper are stronger in favor of expansion of the scope, and once Terhune lies about drinking and then admits to drinking, there is unquestionably enough facts for a request for him to perform field sobriety tests. View objectively, there is ample reasonable articulable suspicion to pass constitutional muster.

II. The Trial Court Appropriately Denied Terhune's Secondary Motion to Suppress Based on the Preliminary Breath Test Request

Tellingly, Terhune alleges the Trial Court erred in denying his motion to suppress based on the PBT request in the same way that he perfunctorily moved to suppress it in the first place: as an afterthought. In his initial motion to suppress, Terhune asked the Trial Court to widen the hearing to include the request for the PBT:

> Alternatively, if the Court believes that there was reasonable suspicion to extend the traffic stop, the traffic stop became unlawful when Trooper De Anda requested that Mr. Terhune provide a PBT. The Defense anticipates that the State will argue that the results of the FSTs provided probable cause for the PBT request. However, there is reason to believe that the FSTs may not have been administered according to the

> standardized criteria established by the National Highway Traffic Safety Administration (NHTSA). An officer may rely on their general observations during a traffic stop, including during FSTs which are defectively administered. [...]
>
> Trooper De Anda stated that he left his police cruiser lights on and had Mr. Terhune face away from his cruiser during the HGN test. However, his report is silent on whether Mr. Terhune was facing towards the Lake Delton officer's cruiser, whether that officer's lights remained activated, or whether he was facing towards a window which reflected rotating strobe lights. Further, Trooper De Anda's report is silent as to the position of his finger [...] during the HGN test. Trooper De Anda's report is likewise silent as to whether he asked Mr. Terhune if he had any pre-existing injuries, or medical conditions, prior to beginning the WAT and OLS tests. Finally, because there is no audio on Trooper De Anda's squad footage, there is no way to independently verify if he provided the required instructions on each test according to his NHTSA training and the standardized testing protocol. Therefore, the results of the FSTs Trooper De Anda performed should be given minimal to no evidentiary weight. The remaining factors did not rise to the level of probable cause to believe an alleged impaired driving offense had been committed, making the request for a PBT unlawful. (23:7-9. *Citations omitted. Emphasis added.*)

"[A] defendant is not entitled to an evidentiary hearing simply to search for something based on nothing but hope or pure speculation… [t]here must be a reasonable possibility that the defendant will establish the necessary factual basis." *State v Radder,* 2018 WI App 36, ¶ 10, 382 Wis.2d 749 (internal citations and quotations omitted; emphasis in the original). No affidavit from Terhune himself accompanied the motion, no affirmative facts from within the officer's report accompanied the motion. At the November 24, 2021 motion hearing the Trial Court identified that the secondary argument lacked any factual basis and was essentially a mechanism for discovery:

> [...] I will characterize the portion […] as one essentially saying that because the report, or the video or the audio isn't clear, I should have a right to perform discovery, and essentially that would be under the guise of it should be suppressed because those things aren't available to Mr. Terhune [...]
>
> It certainly goes to the weight of the admissibility of the evidence for the purposes of the jury, but does not create an issue for suppression.
>
> And so I'll grant the [state's] request here to strike that portion of the motion that deal with essentially I believe he's identified on page 8 [...] and continued forward in regard to the field sobriety tests [...]. (58:8-9.)

Thus the focus of the November 24th suppression hearing was appropriately narrowed to that which occurred before Trooper De Anda expanded the scope of the stop by asking Terhune whether he had any alcohol to drink.

But ultimately Terhune had the opportunity to explore the issues set forth in his motion to suppress over the course of the two dates set for the Refusal Hearing (October 25, 2022 and continued to January 30, 2023 as Terhune's counsel signaled his desire to further cross examine on the issue of FSTs). One of the issues at the at the Refusal Hearing is "[w]hether the officer had probable cause to believe the person was driving or operating a motor vehicle while under the influence of alcohol [etc …]" WIS. STAT. § 343.305(9)(a)5.a. That issue mirrors the standard in WIS. STAT. § 343.303 that establishes if a law enforcement officer has "probable cause to believe" a person is violating or has violated § 346.63(1) or (2m) (i.e. was driving or operating a motor vehicle while under the influence of alcohol, etc…), the officer may request the person to submit to a PBT. WIS. STAT. § 343.305(9)(a)5.a. goes on to require that an issue at a Refusal Hearing be "whether the person was lawfully placed under arrest […]," which *In Re Refusal of Anagnos*, 2012 WI 64, ¶ 62, 341 Wis.2d 576, 815 N.W.2d 67, made clear encompassed challenges to the legality of seizures that led to the arrest.

Terhune challenged nearly every constitutional chokepoint at the Refusal Hearing:

> […] I think the Court can consider whether there was reasonable suspicion to expand the stop, probable cause for the PBT, probable cause to arrest. I would reraise the suppression motion in its entirety. Based on the testimony we have heard today, I would

> argue that none of those things existed. Based on that, I would ask the Court to find Terhune's refusal to be lawful [...] (61:46.)

While the Trial Court responded that it did not intend to "reopen the suppression hearing" (61:46), the issues it then went on to address were identical to those very suppression issues. Most notably, Terhune's argument regarding "probable cause to believe" was addressed directly by the court's ruling on the merits of the Refusal when it addressed the FSTs in detail. The only additional factor after the PBT that contributed to the overall probable cause determination, which the Trial Court gave "small weight" to anyway, was the refusal to provide a PBT. Thus, Terhune asks this Court to make a distinction without a difference, by saying that his scattershot challenge to was somehow given short shrift despite three evidentiary hearings and a detailed analysis of Trooper De Anda's testimony regarding the FSTs.

"[P]robable cause to believe refers to a quantum of proof greater than the reasonable suspicion necessary to justify an investigative stop … but less than the level of proof required to establish probable cause for arrest." *County of Jefferson v. Renz*, 231 Wis. 2d 293, 316, 603 N.W.2d 541 (1999) (internal quotation marks omitted). The Trial Court had ample evidence that the PBT request was lawful, because Trooper De Anda had the following information when he requested a PBT from Terhune:

- Speeding 85 in 70 mph zone (58:14).

- Wide turn crossing two lanes into the turning lane at an intersection (58:14; 61:40).
- Odor of intoxicants from vehicle (58:15-16).
- Odor of cologne or perfume, which is sometimes used as a masking agent (58:16).
- Coming from ax throwing, which Trooper De Anda knew to typically involves alcohol (58:16).
- Slow dexterity in presenting insurance through his phone – slow fingers, which appeared unusual (58:17-18).
- Terhune leaned over passenger and dropped phone (58:18).
- Swaying motion as Terhune exited vehicle (58:18).
- Terhune initially denied drinking, then admitted to one cup of beer when confronted with odor of intoxicants from breath (60:11).
- Five out of six clues on the horizontal gaze nystagmus test (60:13).
- Four out of eight clues on the walk and turn test (61:37).
- Three out of four clues on the one leg stand test (60:16).

At this point, Trooper De Anda had ample evidence to request the PBT under the "probable cause to believe" standard contemplated by WIS. STAT. § 343.303. The Trial Court's factual findings made it clear that "under all the circumstances, the Court can reasonably rely on the field sobriety tests here." (61:50). The Trial Court "[u]nder the circumstances [found] that the refusal here

was not reasonable under all the facts and circumstances [and] that the officer had probable cause in this matter [...]" (61:50). Those findings both specifically acknowledge Terhune's challenge to the FSTs, the standard of "probable cause to believe," and the constitutional chokepoint of the PBT request. But even removing the PBT refusal from the equation, there would have been probable cause for an OWI arrest regardless.

III. The Trial Court Appropriately Denied Terhune's Motion to Declare Wisconsin's Implied Consent Statute Unconstitutional

Every legislative enactment is presumed constitutional, and if any doubt exists about a statute's constitutionality, a court must resolve that doubt in favor of constitutionality. *State v. Ninham*, 2011 WI 33, ¶ 44, 333 Wis. 2d 335, 797 N.W.2d 451. The presumption of constitutionality can be overcome only if the challenging party establishes that the statute is unconstitutional beyond a reasonable doubt. *State v. Forrett*, 2021 WI App 31, ¶ 7, 398 Wis. 2d 371, 961 N.W.2d 132, 134 (*citing 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 steep burden apply to both applied and facial challenges of a statute's constitutionality. *State v. McGuire*, 2010 WI 91, ¶ 25, 328 Wis. 2d 289, 786 N.W.2d 227.

It is well established that it is impermissible to threaten a person with a criminal penalty for refusing a blood test under an implied consent law. *Birchfield v. North Dakota*, 579 U.S. 438, 477, 136 S.Ct. 2160 (2016). But, Wisconsin's Implied Consent law does not impose criminal penalties for refusing. It imposes

only civil penalties, such as license revocation, WIS. STAT. § 343.305(10), and required ignition interlock devices, WIS. STAT. § 343.301(1g)(a)(1). These types of penalties are not prohibited. *See Birchfield*, 579 U.S. at 476; *Missouri v. McNeely*, 569 U.S. 141, 160-161, 133 S.Ct. 1552 (2013) (plurality opinion); *South Dakota v. Neville*, 459 U.S. 553, 560, 103 S.Ct. 916 (1983). The Informing the Accused form states that, upon refusal, other penalties will be imposed in addition to revocation of operating privilege. WIS. STAT. § 343.305(4).

Trooper De Anda read Terhune the Informing the Accused as directed by WIS. STAT. § 343.305. This properly informed Terhune that additional civil penalties would be imposed upon refusal. Nothing in the language of the Informing the Accused contains any reference to a criminal penalty upon refusal. A reasonable person would not assume that "other penalties" means "criminal penalties." And there is nothing in the record that indicates Terhune himself understood "other penalties" to mean "criminal penalties." Terhune has not presented any evidence that he believed he would face criminal penalties if he refused. Additionally, the defendant in this case is charged with Operating While Under the Influence – 1st Offense and Refuse to Take Test for Intoxication After Arrest. Neither of which are criminal offenses.

Precedent confirms the statute's validity. The Wisconsin Supreme Court has already indicated in a number of cases that a motorist effectively consents to searches under the statute by driving, including in a decision implicitly holding that, upon arrest, a driver has already "consent[ed] ... to submit" to BAC testing

under the statute, *State v. Neitzel*, 95 Wis. 2d 191, 201, 289 N.W.2d 828 (1980) - contrary to dicta in *State v. Padley*, 2014 WI App 65, ¶¶ 26, 39 n.10, 354 Wis.2d 545, 849 N.W.2d 867. Likewise, the United States Supreme Court has concluded that implied consent laws are "unquestionably legitimate," *Neville*, 459 U.S. at 560, that they are effective "legal tools" for securing evidence of intoxication "without undertaking warrantless nonconsensual blood draws," *McNeely*, 569 U.S. at 160-61 (plurality), and that none of its cases should be read to "cast doubt" on them, *Birchfield*, 57 U.S. at 476.

The State could not find any cases that overrule *Neville's* holding that refusing to submit to a blood test violates the Fifth Amendment protected against self-incrimination. The distinction between the right to be free from unreasonable searches and seizures and the right to refuse a blood test is an important one. Terhune had a constitutional right to be free from an unreasonable search, but in the case of a refusal to submit to a blood draw "a person suspected of drunk driving has no constitutional right to refuse to take a blood-alcohol test." *Neville*, 459 U.S at 560 n.10.

Terhune cites *State v. Dalton*, 2018 WI 85, 383 Wis.2d 147, 914 N.W.2d 120, in stating that the Wisconsin Supreme Court held that there was a constitutional right to refuse to consent to a blood alcohol test after *Birchfield.* This is not *Dalton's* holding. *Dalton* holds that an enhanced sentence based on the defendant's refusal to submit blood draw was impermissible criminal punishment for exercise of constitutional right to refuse to submit blood sample. *State v.*

Dalton, 2018 WI 85, ¶ 67. *Dalton* confirms that a defendant may not be subject to more severe criminal penalties for refusing to submit to a blood test. It does not stand for the proposition that there is a constitutional right to refuse a blood alcohol test.

Defense also recognizes that *State v. Levanduski*, 2020 WI App 53, ¶ 15, 393 Wis.2d 674, 948 N.W.2d 411 held that the use of refusals as consciousness of guilt evidence did not impermissibly burden the Fourth Amendment right to refuse to consent to a warrantless search, and that the implied consent warnings regarding the use of such evidence do not render otherwise voluntary consent invalid for Fourth Amendment purposes. (Def. Br. 32-33.)

The Wisconsin Supreme Court further solidified the holdings in *McNeely*, *Birchfield*, and *Dalton* in *State v. Prado*, 2021 WI 64, 397 Wis.2d 719, 960 N.W.2d 869. *Prado* holds that a defendant has a constitutional right to refuse searches absent a warrant or exception, it does not explicitly say there is a constitutional right to refuse a blood draw. *State v. Prado*, 2021 WI 64, ¶ 47, (*citing Dalton*, 383 Wis. 2d 147, ¶ 61). *Neville, McNeely, Dalton, Levanduski*, and *Prado* all analyze a driver's right to refuse a blood test when suspected of operating a motor vehicle while under the influence. However, it is important to point out that Trooper De Anda never requested a blood sample from Terhune. Trooper De Anda solely requested a breath sample.

The United States Supreme Court in *Birchfield v. North Dakota* addressed breath tests and held that the Fourth Amendment permits warrantless breath tests

incident to arrests for drunk driving. *Birchfield*, 579 U.S. at 474. *Birchfield* held that because the breath test was a permissible search incident to the driver's arrest for drunk driving, the Fourth Amendment did not require officers to obtain a warrant prior to demanding the breath test, and the driver had no right to refuse it. *Birchfield*, 579 U.S. at 478; *See also State v. Lemberger*, 2017 WI 39, ¶ 34, 374 Wis. 2d 617, 636, 893 N.W.2d 232, 242; *See also State v. Prado*, 2021 WI 64, ¶ 29-30. Therefore, based on *Birchfield*, *Leberger*, and *Prado*, Terhune had no constitutional right to refuse the breath test Trooper De Anda requested of him.

Precedent well establishes that Wisconsin's Implied Consent law is constitutional when it comes to imposing penalties for refusing a chemical test of a driver's blood. Terhune has not met his burden to prove beyond a reasonable doubt the law is unconstitutional on its face. Thus, the Trial Court's decision should be affirmed.

IV. The Trial Court's Finding That Terhune's Refusal Was Unreasonable Should Be Affirmed

Terhune's final challenge is to the Trial Court's overall finding that the Refusal was unreasonable, which is a reiteration of his arguments in sections I and II. Specifically, he argues, because the Court should disregard the FST evidence and the PBT refusal, the remaining evidence is insufficient for the Court to have found Trooper De Anda had probable cause to believe Terhune was OWI and the arrest was unlawful. He does not challenge the 2nd and 3rd issues relevant to WIS.

STAT. § 343.305(9)(a)5, namely whether the officer read the Informing the Accused or whether Terhune in fact refused.

Because this challenge is just a reframing of the same argument, the State would rely on the arguments in sections I and II *supra*, rather than restate all the factors here again. For the reasons set forth above, the Trial Court's reliance on the FSTs was proper, the PBT request was supported by probable cause to believe, and the Trial Court's determination that the refusal was unreasonable should be affirmed.

CONCLUSION

For all the foregoing reasons, the State respectfully requests the trial court's decisions be affirmed.

Respectfully submitted this 12th day of April, 2024.

Michael X. Albrecht
District Attorney
Sauk County District Attorney's Office
515 Oak Street
Baraboo, WI 53913
(608) 355-3280
State Bar No. 1085008

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19 (8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 4,516 words.

Signed:

Michael X. Albrecht
State Bar No. 1085008

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I certify that an electronic copy of this brief complies with the requirement of §809.19(12). The electronic brief is identical in content and format to the printed brief filed this date. A copy of this certificate has been served with the paper copies of this brief and served upon all opposing parties.

Signed:

Michael X. Albrecht
State Bar No. 1085008