STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2024AP79-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

WALTER L. JOHNSON,

Defendant-Respondent.

APPEAL FROM A PRETRIAL ORDER ENTERED IN DANE COUNTY CIRCUIT COURT, THE HONORABLE JOHN D. HYLAND, PRESIDING

REPLY BRIEF OF PLAINTIFF-APPELLANT

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INTRODUCTION

Walter L. Johnson drove 130 miles per hour, went airborne into oncoming traffic, and killed a child. His blood sample tested positive for methamphetamine. He was charged, among other crimes, with homicide by vehicle with a restricted controlled substance in his blood and operating with a restricted controlled substance in the blood causing injury. Methamphetamine is a "restricted controlled substance" under the relevant Wisconsin statutes. However, Johnson argued that "methamphetamine" means only the specific isomer D-meth, not L-meth. He also raised alternative constitutional arguments. The circuit court agreed that "methamphetamine" means only D-meth.

The State appealed. The State pointed out that the restricted controlled substances statutes do not purport to limit the definition of "methamphetamine" to any specific isomer of methamphetamine. The State also argued that Johnson's constitutional arguments do not provide an alternative basis to affirm. Johnson argued that the State forfeited its statutory interpretation argument, that "methamphetamine" means only D-meth in the restricted controlled substances statutes, and that alternatively, making L-meth a restricted controlled substance would be unconstitutional.

Johnson's arguments fail. The State did not forfeit its statutory interpretation argument, which was fairly presented below. L-methamphetamine is unambiguously a restricted controlled substance. Finally, Johnson has failed to show any constitutional basis to affirm the circuit court's decision.

ARGUMENT

I. The State did not forfeit its statutory interpretation argument.

Ignoring context, Johnson claims the State somehow did not argue below that L-meth is a restricted controlled substance and has therefore forfeited the argument. (Johnson's Br. 8.) Johnson is incorrect.

In August 2022, Johnson filed a *Franks*[1] / *Mann*[2] motion on the basis that the State and the crime lab failed to specify whether Johnson's blood contained D-meth or L-meth, which he argued was not a restricted controlled substance. (R. 47.) The State responded with exactly the statutory interpretation argument it makes now and asserted that L-meth is a restricted controlled substance. (R. 54:3–6.) The circuit court denied the *Franks* / *Mann* motion and wrote, "The statutes simply do not differentiate between the two isomers when it comes to the offense charged." (R. 55:5.)

It is in the context of this ruling that the State responded to Johnson's later motion to dismiss due to spoliation of the blood sample, again on the basis that the lab's results did not distinguish between L-meth and D-meth (and that the spoliation of the blood sample left him unable to test for such distinction). (R. 101.) The statement that Johnson quotes out of context, "There is really one novel issue before the court . . . . It is a spoliation issue," was made at the evidentiary hearing on this spoliation issue. (Johnson's Br. 8; R. 78:9.) At that hearing, the lab analysts not only testified about retention procedures but gave detailed testimony regarding the differences between L-meth and D-meth. (R. 78.) The L-meth vs. D-meth distinction was, after all, the

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[1] *Franks v. Delaware*, 438 U.S. 154 (1978).

[2] *State v. Mann*, 123 Wis. 2d 375, 367 N.W.2d 209 (1985).

basis for Johnson's spoliation argument. (R. 78:14.) And the State explicitly argued that spoliation was a non-issue because it did not matter whether Johnson's blood contained L-meth or D-meth, as both are restricted controlled substances. (R. 78:14–15.)

Finally, Johnson's claim that the State "refused" to make a statutory interpretation argument in the circuit court (Johnson's Br. 8) is false. Instead, the State simply pointed out that the circuit court had already ruled in its favor on that issue. (R. 55:5; 109:11.)

Thus, contrary to Johnson's claim, the State did not "fail[ ] to argue" the statutory interpretation issue. (Johnson's Br. 8.) The State argued the issue in detail, and the circuit court initially ruled in the State's favor. (R. 54:3–6; 55:5.) The circuit court later reversed that ruling and held in a detailed statutory analysis that L-meth was not a restricted controlled substance (R. 111:12), which is the ruling on appeal now. But Johnson's claim that the State somehow did not present this issue in the circuit court is contradicted by the record.

II. L-methamphetamine is unambiguously a restricted controlled substance.

As the State argued in its opening brief, L-meth is unambiguously a restricted controlled substance under Wis. Stat. §§ 340.01(50m) and 967.055(1m)(b). This is because the restricted controlled substances statutes define methamphetamine as a restricted controlled substance, without any indication that this definition is limited to only one specific isomer of methamphetamine. The fact that L-meth cannot be regulated as a controlled substance under Chapter 961 does not alter the very definition of "methamphetamine" in the rest of the criminal code.

Johnson's counterargument relies upon the incorrect belief that being regulable as a "controlled substance" under Chapter 961 is a prerequisite for being a "restricted controlled

substance" under sections 340.01(50m) and 967.055(1m)(b). It isn't. They are different definitions that serve completely different purposes. "Controlled substances" are substances whose manufacture, distribution, possession, etc., are prohibited or regulated for health and safety reasons due to their potential for harm and abuse, in order to protect the health and general welfare of the public. Wis. Stat. § 961.001. The purpose of "restricted controlled substance" laws, on the other hand, is to "encourage the vigorous prosecution of offenses concerning the operation of motor vehicles by persons under the influence of an intoxicant . . . ." Wis. Stat. § 967.055(1)(a); *see also* § 346.63. It is not for the general health and welfare of the public, but for the specific purpose of keeping the roads safe.

Nor does section 961.11(6)(a), which prevents regulation of L-meth as a controlled substance, purport to alter the definition of methamphetamine in the criminal code. Instead, it simply exempts a specific subset of methamphetamine, L-meth, from regulation under Chapter 961. It says nothing about the definition of methamphetamine, and it does not claim to apply to any other chapters of Wisconsin's criminal code.

Contrary to Johnson's assertion, there is nothing illogical or irrational about making L-meth a restricted controlled substance even though it can be lawfully sold over the counter and cannot be regulated as a controlled substance under Chapter 961. Again, the two definitions serve different purposes: Chapter 961 is about general health and public welfare, whereas the restricted controlled substance statutes address the specific issue of roadway safety. Alcohol, for example, can be lawfully sold over the counter, but there is no question that the criminal laws related to drinking and driving can coexist with laws regulating the production, sale, and consumption of alcohol in Chapter 125.

Finally, Johnson's reliance on Wis. Stat. § 346.63(1)(a), which prohibits operating while under the influence of any drug to a degree that renders a person incapable of safely driving, also falls flat. The argument that section 346.63(1)(a) already prevents intoxicated driving (Johnson's Br. 12) applies equally to D-meth and to any other drug that is also a restricted controlled substance—the whole point of the restricted controlled substance statute is that it removes the need for the State to prove intoxication. And Johnson cites no law suggesting the mere fact that one action might violate multiple statutes is somehow problematic.

L-meth is unambiguously a restricted controlled substance. The circuit court erred when it found otherwise.

III. Johnson's constitutional arguments fail.

Johnson argued below that if L-meth were a restricted controlled substance, this would violate his substantive due process right because there would be no rational basis for the prohibition. (R. 101:18–19.) He also argued that it would violate equal protection because dextromethorphan, the active ingredient in some cough medicines, is not similarly regulated. (R. 101:20.) While the circuit court did not reach these arguments, the State challenged these arguments in its opening brief. (State's Opening Br. 21–29.)

Johnson now presents several arguments that this Court should not review the constitutional claims he raised below. As the State acknowledged in its opening brief, it is true that the circuit court did not reach this issue, and this Court need not reach this issue either. The State briefed the issue in case this Court chooses to reach it "in the interest of judicial efficiency," *see Sands v. Menard, Inc.*, 2013 WI App 47, ¶ 3, 347 Wis. 2d 446, 831 N.W.2d 805, and in anticipation of the alternative grounds for affirmance that Johnson would raise in his response brief.

Johnson presents contradictory arguments regarding the constitutional question. He first asserts that "there has not been sufficient fact finding [in the circuit court] to properly address the [constitutional] challenges presented." (Johnson's Br. 16.) But he then argues that this Court can affirm on these constitutional issues—which he has just said this Court does not have enough information to address. (Johnson's Br. 17.) If Johnson is correct that there has not been sufficient factfinding for this Court to properly address the constitutional issues, it is not clear how this Court would be able to affirm on those very issues.

If this Court believes sufficient factfinding has occurred and chooses to address Johnson's constitutional claims, this Court should reject them. Regarding Johnson's substantive due process claim,[3] as explained in the State's opening brief, all that is required to uphold the law is a rational basis. *State v. Smith*, 2010 WI 16, ¶ 14, 323 Wis. 2d 377, 780 N.W.2d 90. The classification of L-meth as a restricted controlled substance has a rational basis for at least two reasons. First, L-meth can create impairment when taken in excess. (R. 111:16.) The intoxication caused by L-meth has even been observed to be similar to that caused by D-meth at high doses, albeit for a shortened period of time. *See* Anna Moszczynska & Sean Patrick Callan, *Molecular, Behavioral, and Physiological Consequences of Methamphetamine Neurotoxicity: Implications for Treatment*, J Pharmacol Exp

[3] In its opening brief, the State pointed out that Johnson presented no evidence he actually used an L-meth-containing product and failed to reply to this point in his circuit court reply brief. However, the State's assertion that Johnson failed to "state he was a user of a product containing L-meth" was not accurate in the context of the entire record. As Johnson points out, he did assert in an earlier motion that he used nasal inhalers, which may potentially contain L-meth. (Johnson's Br. 18; R. 41:5.) The State apologizes for this inadvertent oversight.

Ther. 362:474–88 (2017) https://pmc.ncbi.nlm.nih.gov/articles/PMC11047030/ (last visited Nov. 5, 2024). This potential for impairment is a rational basis to withhold the privilege of driving on public highways from those with a detectable amount of L-meth in their bloodstreams.

Second, classifying L-meth as a restricted controlled substance is rational due to the extreme danger caused by driving after consuming D-meth, combined with the difficulty in distinguishing between D-meth and L-meth. Johnson has not disputed that operating a vehicle after consuming D-meth is extraordinarily dangerous, and he of course has not disputed that the Wisconsin State Laboratory of Hygiene does not have the necessary equipment to distinguish L-meth from D-meth. (Johnson's Br. 6.) Therefore, it is rational for the legislature to temporarily withhold the privilege of driving on public highways from those with a detectable amount of L-meth in their blood, as this facilitates the "vigorous prosecution" of those who drive under the influence of D-meth. Wis. Stat. § 967.055(1)(a); *see also* § 346.63.

Johnson's equal protection argument also fails. Johnson uses the fact that dextromethorphan (a cough medicine) is not a restricted controlled substance to argue that the law distinguishes between "the group of people who have sinus decongestion [*sic*]" and "the group of people who have a cough," and that there is no rational basis of the distinction. (Johnson's Br. 20–21.) There are several flaws with this argument. First, the two products are much different because L-meth can be easily confused with the highly dangerous D-meth in blood tests, whereas he has not shown the same issue exists for dextromethorphan. Second, he has not shown that the type of impairment caused by L-meth and dextromethorphan are sufficiently identical to make users similarly situated—he has shown only that both may cause "impairment" generally. (Johnson's Br. 20–21.)

Third, and perhaps most importantly, this case involves rational basis review, which does not require narrow tailoring, *see Smith*, 323 Wis. 2d 377, ¶ 12, so it simply does not matter that some substances which can cause impairment are not restricted controlled substances. It cannot be that the legislature's inability to list every impairing substance in existence somehow invalidates the restricted controlled substance laws regarding concededly impairing substances that have been listed.

Finally, Johnson briefly hints at a creative argument that making L-meth a restricted controlled substance, but not making the cough medicine dextromethorphan a restricted controlled substance, is somehow a race-based classification. (Johnson's Br. 22.) This argument fails. To start, it is undeveloped. He does not cite any law regarding the constitutional standard for race-based classifications, nor does he flesh out or support the argument he hints at, which is presumably that the use of L-meth-containing products is higher for some races than others. (Johnson's Br. 22.)

Even if this Court considers such an argument, this Court should reject it. As discussed above, Johnson's burden is high—he must prove beyond a reasonable doubt that the statute is unconstitutional. *Wis. Med. Soc'y, Inc. v. Morgan*, 2010 WI 94, ¶ 37, 328 Wis. 2d 469, 787 N.W.2d 22. The minimal evidence he has presented does not come close to satisfying this burden.

Johnson's sole evidence for this race-based equal protection claim consists of a footnote containing citations to two articles that he misunderstands. Neither article purports to establish that African Americans are "more disposed to" sinus congestion such that they would disproportionately require the use of L-meth-containing nasal inhalers. (Johnson's Br. 22.) Instead, one article concludes that among cigarette smokers, African Americans are at "greater risk for *undiagnosed* COPD." A. James Mamary et al., *Race and*

Gender Disparities are Evident in COPD Underdiagnoses Across all Severities of Measured Airflow Obstruction, Chronic Obstr Pulm Dis. 5:177–84 (2018) https://pmc.ncbi.nlm.nih.gov/articles/PMC6296789/ (last accessed October 31, 2024) (emphasis added). The other article is about potential disparities in health care access. Zachary M. Soler et al., *Chronic rhinosinusitis, race, and ethnicity*, Am J Rhinol Allergy 26:110–16 (2012) https://pmc.ncbi.nlm.nih.gov/articles/PMC3345896/ (last accessed October 31, 2024). Neither article says what Johnson believes it says.

In any event, Johnson's vague assertion that "members of suspect classes appear to be more disposed to ailments that can entail certain over the counter medication that, when combined with driving, are treated different under the law and for no apparent reason," (Johnson's Br. 22), does not come close to proving the statute unconstitutional beyond a reasonable doubt. This Court should not make such a sea change in the law based on a footnote that cites (and misinterprets) just two social science articles. *See, e.g.*, *State v. Roberson*, 2019 WI 102, ¶ 37, 389 Wis. 2d 190, 935 N.W.2d 813 ("[S]ocial science research cannot be used to define the meaning of a constitutional provision.").

CONCLUSION

This Court should reverse the circuit court's order.

Dated this 14th day of November 2024.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm), and (c) for a brief produced with a proportional serif font. The length of this brief is 2,499 words.

Dated this 14th day of November 2024.

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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 14th day of November 2024.

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