STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2024AP1012-CRLV

STATE OF WISCONSIN

Plaintiff-Respondent.

v.

NICHOLAS L. SPARBY-DUNCAN

Defendant-Petitioner

STATE'S RESPONSE TO PETITION FOR LEAVE TO APPEAL A NON-FINAL ORDER ENTERED IN THE DUNN COUNTY CIRCUIT COURT, THE HONORABLE JAMES M. PETERSON, PRESIDING

INTRODUCTION

Plaintiff-Respondent State of Wisconsin by its undersigned counsel and pursuant to Wisl Stat. § (Rule) 809.50(2), opposes defendant-petitioner Nicholas Sparby-Duncan's petition for leave to appeal a non-final order of the Dunn County Circuit Court dated May 9, 2024 (signed May 8, efiled May 9), in case number 2023CT10.

The order denied Sparby-Duncan's motion to Dismiss Counts 1 and 4 (Failure to Install IID and Operating with a Prohibited Alcohol Concentration respectively). Sparby-Duncan contented that these counts cannot be charged against him as it would violate the holding of *Forrett*.

This Court should deny Sparby-Duncan's petition because he has failed to show that granting an interlocutory appeal in this case is warranted under Wis Stat. §§ 808.03(2) and (Rule) 809.50, including the requirement that he demonstrate a substantial likelihood of success on appeal.

BACKGROUND

In 2008, Sparby-Duncan was convicted in Eau Claire County of refusing to submit to a warrantless blood draw. On December 17, 2013, Sparby-Duncan plead guilty to Operating with a Restricted Controlled Substance, contrary to Wis. Stat. § 346.63(1)(am). On July 24, 2013, Supervisor Laura Liddicoat of the Wisconsin State Laboratory of Hygiene analyzed Sparby-Duncan's blood sample. Supervisor Liddicoat advised that the testing of the testing of the Sparby-Duncan's blood revealed an ethanol concentration of .064 ng/100 mL, 1.9 ng/mL of Delta-9 THC, and 36 ng/mL of Carboxy THC. The 2013 Court ordered Sparby-Duncan to install an Ignition Interlock Device (IID) for a period of 12 months (a non-criminal penalty).

The State is in agreement with the Defense's recitation of the criminal charges Sparby-Duncan is facing in Dunn Count Case 22CT10.

ARGUMENT

An interlocutory appeal is not warranted.

Only final orders are appealable as of right. Wis. Stat. § 808.03(1). "The final judgment-final order rule is designed to prohibit piecemeal disposal of litigation and thus plays an important role in the movement of cases through the judicial system." *State ex rel. A.E. v. Circuit Court for Green Lake County*, 94 Wis. 2d 98, 101, 288 N.W.2d 125 (1980). For this reason, "interlocutory appeals are undesirable, especially in criminal prosecutions, because they cause delays which are inimical to an effective criminal justice system." *Id.* at 102. As Michael S. Heffernan stated in *Appellate Practice and Procedure in Wisconsin* § 9.5 (7th ed. 2016), the policy disfavoring

interlocutory appeals also recognizes courts' heavy caseloads.

The criteria for obtaining permission to pursue an interlocutory appeal are therefore strict and limiting. Under Wis. Stat. § (Rule) 809.50(1)(c), an appellate court will grant a petition for leave to appeal a non-final order only if it would protect the petitioner from substantial or irreparable injury, materially advance termination of the litigation or clarify further proceedings therein, or clarify an issue of general importance in the administration of justice. These same criteria are codified in Wis. Stat. § 809.03(2).

The burden is on the petitioner to show that interlocutory review is necessary under one or more statutory criteria. *See. State v. Borowski*, 164 Wis. 2d 730, 735, 476 N.W.2d 316 (Ct. App. 1991). "The defendant must also show a substantial likelihood of success on the merits." *State v. Webb*, 160 Wis. 2d 622, 632, 467 N.W.2d 108 (1991). That criterion not enumerated in the statutes, may be the most important because if a defendant has no substantial likelihood of success on appeal, none of the statutory criteria can be satisfied. *See id.*

A. The issue presented does not warrant an interlocutory appeal because under the facts set out in Sparby-Duncan's petition, the circuit court properly denied the motion to dismiss counts 1 and 4, so Sparby-Duncan cannot show a substantial likelihood of success on the merits.

Given the circuit court's decision, it is clear that Sparby-Duncan cannot demonstrate the likelihood of success on the merits necessary to warrant an interlocutory review. Reversal by this Court in this case would require this court to conclude that Sparby-Duncan met his burden of establishing that *Forrett* would bar the State from charging him with Counts 1 and 4. *State v. Forrett,* 401 Wis. 2d 678, 974 N.W.2d 422 (2022).

Sparby-Duncan asserts that *Forrett* should bar the State from charging him with Count 1: Failure to Install Ignition Interlock Device (IID) and Count 4: Operate with

a Prohibited Alcohol Concentration (PAC) at a .02 restriction standard. Sparby-Duncan claims this runs counter to the holding of *Forrett*. This is simply inaccurate.

Forrett is clear, "We hold that Wis. Stat. §§ 343.307(1) and 346.65(2)(am) are unconstitutional to the extent that they count prior revocations resulting solely from a person's refusal to submit to a warrantless blood draw as offenses for the purpose of increasing the criminal penalty." *Id.,* at ¶ 20.

Per Wis. Stat. § 343.301(1g)(b)(2), if the person has one or more prior revocations counted under Wis. Stat. § 343.307(1), the court shall order an IID. Wis. Stat. § 343.307(1)(f) counts revocations under Wis. Stat. § 343.305(10), i.e., refusals. Thus, under Wis. Stat. § 343.301(1g)(b)(2), Sparby-Duncan's prior 2008 refusal conviction would allow the Court to order an IID in his 2013 case. Therefore, even without Wisconsin's graduated penalty scheme, the 2013 court would have been justified in ordering Sparby-Duncan to install an IID.

As *Forrett* held, Wis. Stat. §§ 343.307(1) and 346.65(2)(am) are only unconstitutional to the extent it increases criminal penalties based on a blood test refusal. An IID is not a criminal penalty. Therefore, the associating consequences of the IID order would not be criminalizing his past refusal.

Forrett lists two examples of the forms these unconstitutional criminal penalties may take. *Id.,* at ¶ 9. The first was that a person is criminally charged specifically for refusing a warrantless blood draw. *Id.,* citing *Birchfield v. North Dakota*, 579 U.S. 438, 136 S. Ct. 2160, 195 L. Ed. 2d 560 (2016). Or perhaps a person could be subjected to a longer sentence "for the sole reason that he refused to submit to a [warrantless] blood test." *Id.,* citing *State v. Dalton*, 383 Wis. 2d 147, ¶¶ 59-61, 67, 914 N.W.2d 120 (2018). *Forrett* states that these examples are illustrative, but not exhaustive. However, they do grant insight as to the types of criminal penalties *Forrett* held to be unconstitutional.

These criminal penalties referenced by *Forrett* are far different and not analogous to the penalties Sparby-Duncan is claiming should be barred by *Forrett*. The State is not criminalizing his past refusal. Nor is the State enhancing the length of the sentence he could be subject to (for the sole reason of refusing the blood test).

An IID is not a criminal penalty, it is an administrative penalty. Sparby-Duncan has not sought to have that order vacated, and thus it remains of record and unreversed. Therefore, Sparby-Duncan was still under that legally ordered administrative penalty at the time of the incident in this most recent case.

Sparby-Duncan argues that by charging him with Count 1: Failure to install an ignition interlock device, the State is criminalizing his 2008 refusal. However, this is simply inaccurate. Sparby-Duncan is not charged with having an IID order. He is charged because of his failure to abide by a lawful court order to install an IID. The criminal penalty is not for his refusal of a blood draw, but for his refusal to abide by a court order. This is an important distinction Sparby-Duncan fails to address.

In regards to the PAC charge, this again, is not criminalizing Sparby-Duncan for his past refusal. An IID was ordered in 2013 for a case in which he was not convicted of a refusal, but rather an OWI offense. Wis. Stat. § 340.01(46m)(c) states that prohibited alcohol concentration means: "if the person is subject to an order under § 343.301...an alcohol concentration of more than .02." Again, this is not criminalizing his past refusal. He was subject to administrative penalties.

Sparby-Duncan cannot demonstrate the likelihood of success on the merits necessary to warrant an interlocutory review.

B. Sparby-Duncan's petition does not meet any of the other criteria for granting an interlocutory appeal.

Sparby-Duncan cannot satisfy any of the remaining criteria for an interlocutory appeal, either. First, Sparby-

Duncan cannot show that an interlocutory appeal is necessary to protect him from substantial or irreparable injury. As the above analysis shows, the law is clear that Sparby-Duncan is not likely to suffer an irreparable or substantial injury because any eventual appeal of this issue would be resolved in the State's favor.

Second, Sparby-Duncan cannot show that immediate review will materially advance termination of the litigation or clarify further proceedings. Because there is no substantial likelihood of success on appeal, an immediate appeal simply prolongs the criminal proceedings in this case. Moreover, the issue in this case is one that Sparby-Duncan has preserved and may raise in the normal course of a direct appeal.

Third, Sparby-Duncan cannot show that interlocutory review is necessary to clarify an issue of general importance in the administration of justice.

Sparby-Duncan overstates the significance of the PAC charge regarding the State's ability to prosecute him. He seems to claim that if the PAC charge was dropped, the State would have a nearly insurmountable challenge in convicting him of the OWI charge. Sparby-Duncan claims this because he claims there was no bad driving observed and his BAC was below .08.

However, he omits some rather key facts as well. He fails to mention that his blood test came back at a .079 (.001 below the legal limit). He does not mention that there were numerous physical indicators of intoxication. Neither does he mention his poor performance on numerous Standardized and Non-Standardized Field Sobriety Tests (indicating impairment). Perhaps a Jury would agree with Sparby-Duncan's assessment of the case. However, that is far from certain. If a Jury were to find him guilty of the PAC charge, but Not Guilty of the OWI charge, then this appeal may indeed have some merit. However, if a Jury were to find him guilty of the OWI charge, then whether or not the PAC charge is valid per *Forrett* becomes a moot point. Yet another reason for this Court to deny the interlocutory appeal.

If a Jury finds him Guilty of the OWI charge, then the appropriateness of the PAC charge is irrelevant. The convictions would merge (if he was also found guilty of the PAC charge) and he would not be subject to further/enhanced penalties. Therefore, this Court should deny Sparby-Duncan's petition for an interlocutory appeal. Should he be found Guilty of the PAC charge, but Not Guilty of the OWI charge, then he may make his appeal.

CONCLUSION

The State requests that this Court deny Sparby-Duncan's petition for leave to appeal. However, if this Court decides to grant the petition, then the State requests the opportunity for full briefing on the issue.

Dated this 15th day of July 2024.

Respectfully submitted,

Electronically signed by
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CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. § (Rule) 809.50(4) or Wis. Stat. § (Rule) 809.51(4) for a response setting forth the word count or page count of the document as provided in sub (1) or (2). The length of this brief is 1,790 words.

Dated this 15th day of July 2024.

Electronically signed by:

David T. Schneck
DAVID T. SCHNECK

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 Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 15th day of July 2024.

Electronically signed by:

David T. Schneck
DAVID T. SCHNECK