STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2024AP1012-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

NICHOLAS L. SPARBY-DUNCAN,

Defendant-Appellant.

On Appeal from a Nonfinal Order Denying a Motion to Dismiss Entered in the Dunn County Circuit Court, the Honorable James M. Peterson Presiding.

BRIEF OF DEFENDANT-APPELLANT

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CASES CITED

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ISSUE PRESENTED

1. Mr. Sparby-Duncan is presently charged with operating with a prohibited alcohol concentration and failure to install an ignition interlock device. He would face neither of these charges but for the exercise of his constitutionally-protected right to refuse a warrantless blood draw in 2008. Under these circumstances, is the use of the prior refusal to impose criminal penalties unconstitutional as applied to Mr. Sparby-Duncan?

   The circuit court answered no.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Mr. Sparby-Duncan does not request oral argument, but would welcome the opportunity if this Court determines oral argument would be helpful. Publication is warranted to develop the law on an issue of constitutional importance and to provide guidance to circuit courts, prosecutors, and defense attorneys.

STATEMENT OF THE CASE AND FACTS

The State filed a complaint charging Mr. Sparby-Duncan with failure to install an ignition interlock device (IID), operating a motor vehicle while

revoked (OAR), and second-offense operating a motor vehicle while under the influence (OWI). (5:1-2). Subsequently, the State filed an amended complaint which added the charge of second-offense operating with a prohibited alcohol concentration (PAC). (14:2). Although Mr. Sparby-Duncan's blood alcohol concentration (BAC) was less than 0.08 at the time of the alleged offenses, the amended complaint asserted that his BAC limit was 0.02 because he was subject to an IID order under Wis. Stat. § 343.301. (14:2).[1]

The IID order was imposed in connection with Mr. Sparby-Duncan's sentence for a second-offense operating with a restricted controlled substance (RCS) offense in 2013. (27:2, 12). The RCS conviction, in turn, counted as a second-offense under Wis. Stat. § 343.307(1) because Mr. Sparby-Duncan's operating privileges had been revoked following his refusal to submit to a warrantless blood draw in 2008. (29:10).[2]

Mr. Sparby-Duncan filed a motion to dismiss the PAC and IID charges on the grounds that these

[1] Pursuant to Wis. Stat. § 340.01(46m)(c), a motorist's BAC limit is 0.02 "[i]f the person is subject to an order under s. 343.301 or if the person has 3 or more prior convictions, suspensions or revocations, as counted under s. 343.307 (1)[.]"

[2] Mr. Sparby-Duncan was charged with second-offense OWI in this case because the State correctly concedes that the 2008 revocation could not be counted as a prior offense based on *North Dakota v. Birchfield*, 579 U.S. 438 (2016), and *State v. Forrett*, 2022 WI 37, ¶1, 401 Wis. 2d 678, 974 N.W.2d 422 (revocations based on warrantless blood draw refusals may not be counted as prior OWI offenses).

charges unconstitutionally threatened him with criminal penalties based on his prior refusal of the blood draw. (27:1-2). The motion first noted that a circuit court is statutorily-authorized to impose an IID order only under the following circumstances:

> 1. The person improperly refused to take a test under s. 343.305.
>
> 2. The person violated s. 346.63 (1) or (2), 940.09 (1), or 940.25 and either of the following applies:
>
> a. The person had an alcohol concentration of 0.15 or more at the time of the offense.
>
> 343.301(1g)(a)2.b.b. The person has a total of one or more prior convictions, suspensions, or revocations, counting convictions under ss. 940.09 (1) and 940.25 in the person's lifetime and other convictions, suspensions, and revocations counted under s. 343.307 (1).

Wis. Stat. § 343.301(1g)(a); (27:3).

Based on the above, the motion explained that the circuit court in the 2013 RCS case was statutorily-authorized to impose an IID order solely because Mr. Sparby-Duncan had a prior revocation for refusing to submit to a warrantless blood draw. (27:2-3). That is, there was no allegation in the RCS case that Mr. Sparby-Duncan drove with a BAC of 0.15 or more, nor did the court in that case find that he improperly refused to take a test under Wis. Stat. § 343.305. (27:8-12; 29:10). The motion thus argued that the PAC and IID charges were inextricably intertwined with Mr. Sparby-Duncan's exercise of his constitutionally-

protected right to refuse a warrantless blood draw. (27:3). *See Forrett*, 2022 WI 37, ¶18 (citing *Birchfield*, 579 U.S. at 477-78).

The circuit court denied the motion. (38:1; App. 3). In support of its decision, the court noted that there is no constitutional prohibition on implied-consent laws that impose civil penalties and evidentiary consequences on drivers who refuse to comply with warrantless blood draws. (41:4-5; App. 7-8). *See Birchfield*, 579 U.S. at 476-77. The court then stated the following:

> So I think it's an interesting issue, a good issue; however, in this Court's opinion, it would be akin to -- you could still revoke someone's operating privileges for refusing a blood test, you know, if there wasn't a companion OWI conviction for that, and I think the same is true for this [IID] order, which was legal at the time it was entered. And so I don't believe that having the ignition interlock is an ongoing punishment.
>
> The punishment potentially could come from failing to install that ignition interlock. And there's no evidence that anybody went back and said we have this *Forrett* case and I want you to reopen and get rid of this ignition interlock requirement.
>
> …
>
> I don't know what the Court of Appeals would do with it. I think, again, it's a close call. And -- but there's no case exactly on point for it.

(41:4-6; App. 7-9).

Mr. Sparby-Duncan filed a petition for leave to appeal the circuit court's decision. This Court granted the petition and converted the case to a three-judge appeal.

ARGUMENT

I. The PAC and IID charges are unconstitutional as applied to Mr. Sparby-Duncan because they rest on his prior refusal to submit to a warrantless blood draw.

Mr. Sparby-Duncan would not face PAC and IID charges today but for his prior refusal of a warrantless blood draw. As discussed below, these charges are unconstitutional as applied to Mr. Sparby-Duncan because they impermissibly threaten him with criminal penalties based on his exercise of a constitutionally-protected right.

A. Standard of review.

The constitutionality of a statute is a question of law that is reviewed de novo. *Winnebago Cnty. v. C.S.*, 2020 WI 33, ¶13, 391 Wis. 2d 35, 940 N.W.2d 875. Under Wisconsin law, statutes are presumed constitutional. *State v. Cole*, 2003 WI 112, ¶11, 264 Wis. 2d 520, 665 N.W.2d 328. The party challenging the statute must "prove that the statute is unconstitutional beyond a reasonable doubt." *Id.*

B. The PAC and IID charges are unconstitutional as applied to Mr. Sparby-Duncan.

The Fourth Amendment to the United States Constitution and Article I, section 11 of the Wisconsin Constitution protect against unreasonable searches and seizures. *State v. Eason*, 2001 WI 98, ¶16, 245 Wis. 2d 206, 629 N.W.2d 625.

In *Birchfield*, the United States Supreme Court examined whether laws making "it a crime for a motorist to refuse to be tested after being lawfully arrested for driving while impaired" violated the Fourth Amendment's proscription against unreasonable searches and seizures. 579 U.S. at 444. As to breath tests, the Court noted that these tests are significantly less intrusive than blood draws and do not implicate substantial privacy concerns. *Id.* at 474-75. Accordingly, the Court concluded that a breath test may be administered as a search incident to a lawful arrest for drunk driving and that states may impose criminal penalties for refusals to submit to breath tests. *Id.* at 474-76.

However, the Court concluded that unlike breath tests, blood draws do not qualify for an exception from the warrant requirement under the search-incident-to-arrest doctrine because "[b]lood tests are significantly more intrusive, and their reasonableness must be judged in light of the availability of the less invasive alternative of a breath test." *Id.* at 474. In doing so, the Court noted the

necessity of piercing the skin to extract a vital bodily fluid versus the ease of administering a breath test, the increased expectation of privacy in blood as compared to breath, and the information which may be obtained from a blood sample beyond a mere BAC reading. *Id.* at 463-64. Having determined that the search-incident-to-arrest doctrine did not justify warrantless blood draws, the Court considered whether blood draws were justified based on a driver's legally implied consent to submit to them. *Id.* at 476.

The Court determined "that motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense." *Id.* at 477. Acknowledging that "prior opinions have referred approvingly to the general concept of implied consent laws that impose *civil penalties and evidentiary consequences* on motorists who refuse to comply," the Court emphasized that *criminal penalties may not be imposed* for a blood draw refusal. *Id.* at 476-77. (emphasis added). The Court stated that "it is another matter ... for a State to not only insist upon an intrusive blood test, but also to impose criminal penalties on the refusal to submit to such a test." *Id.* at 477. "There must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads." *Id.* Thus, "*Birchfield* dictates that criminal penalties may not be imposed for the refusal to submit to a blood test." *State v. Dalton*, 2018 WI 85, ¶59, 383 Wis. 2d 147, 914 N.W.2d 120.

The Wisconsin Supreme Court subsequently applied *Birchfield* when reviewing the constitutionality of the state's statutory penalty scheme for OWI offenses to the extent that it permitted counting a prior revocation for refusing to submit to a warrantless blood draw as a prior OWI offense. *Forrett*, 2022 WI 37. The court noted that while unconstitutional criminal penalties can take many forms, the State cannot penalize a person because she has exercised a constitutional right "[n]o matter the form" of the criminal penalty. *Id.*, ¶9. The court further recognized that this rationale applies with no less force merely because a criminal penalty is imposed in a separate, subsequent case. *Id.*, ¶11 (citing *Birchfiel*d, 579 U.S. at 476-78; *Dalton*, 2018 WI 85, ¶¶61-66). Consequently, the court held that it is unconstitutional to impose a criminal penalty for a separate, subsequent OWI offense based on a prior instance in which a driver refused a warrantless blood draw. *Id.*, ¶14.

In reaching this conclusion, the Wisconsin Supreme Court rejected the State's assertion that imposing a criminal penalty in a later case is permissible simply because it does not directly punish the exercise of a constitutional right. *Id.*, ¶¶15-17. The State had argued, in essence, that punishment through the graduated penalty scheme was too attenuated to violate the Fourth Amendment. *Id.*, ¶17. But the court disagreed and instead recognized the following:

> Whether the criminal punishment is immediate or delayed, the OWI statutes impermissibly allow the State to punish more severely an OWI offender who refused a warrantless blood draw 'solely because he availed himself of one of his constitutional rights.'

Id. (quoting *Buckner v. State*, 56 Wis. 2d 539, 550, 202 Wis. 2d 406 (1972)).

Based on the above, Mr. Sparby-Duncan's PAC and IID charges are unconstitutional as applied to him because they rest on his prior refusal to submit to a warrantless blood draw in 2008. Simply put, Mr. Sparby-Duncan would not face either of these charges today but for his prior exercise of a constitutionally-protected right. And under established caselaw, a defendant may not be penalized for exercising a constitutionally-protected right. *See Birchfield*, 579 U.S. at 476-77; *see also United States v. Goodwin*, 457 U.S. 368, 372 (1982) ("For while an individual certainly may be penalized for violating the law, he just as certainly may not be punished for exercising a protected statutory or constitutional right."); *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) (it is a due process violation to punish a person for doing what the "law plainly allows"). Moreover, a defendant may not be penalized for exercising a constitutionally-protected right regardless of the form the criminal penalty takes and regardless of whether the penalty is only imposed in a separate, subsequent case. *Forrett*, 2022 WI 37, ¶¶9-11. It is therefore impermissible for the State to threaten Mr. Sparby-Duncan with criminal penalties in the instant case because those

penalties are available *solely* as a result of his prior exercise of his right to refuse a warrantless blood draw.

The circuit court's reasoning in denying the motion to dismiss is flawed in two key respects. First, the court stated that there was "no evidence that anybody went back and said we have this *Forrett* case and I want you to reopen and get rid of this ignition interlock requirement." (41:5; App. 8). But contrary to this reasoning, *Forrett* did not hold that a defendant must preemptively attack a prior judgment in order to eliminate the threat of criminal penalties in a separate, subsequent case.[3] That is, Forrett did not need to challenge the constitutionality of his prior blood-draw refusal in order to prevent the State from using that refusal against him in the future. Instead, the court granted Forrett's challenge to the criminal penalties imposed in a separate, subsequent OWI case that he would not have faced but for his prior exercise of his right to refuse a warrantless blood draw. *See Forrett*, 2022 WI 37¸ ¶18 ("But for his 1996 refusal, Forrett's current OWI conviction would be his sixth" offense and carry lower criminal penalties.). Similarly, Mr. Sparby-Duncan challenges the threat of criminal penalties in the instant case that he would not face but for his prior exercise of his right to refuse a

[3] *Forrett* was silent with respect to its applicability to cases on collateral review. *See Teague v. Lane*, 489 U.S. 288, 311 (1989) (on collateral review, a new rule is retroactive only if it is "substantive" or announces a "watershed" rule of criminal procedure.)

warrantless blood draw. Thus, under *Forrett*, there was no requirement for Mr. Sparby-Duncan to collaterally attack the IID order from 2013.

Second, the circuit court suggested that any potential PAC and IID penalties would derive "from failing to install that ignition interlock" rather than the prior refusal to submit to a warrantless blood draw. (41:5; App. 8). But this reasoning simply mirrors an argument that the Wisconsin Supreme Court flatly rejected in *Forrett*, where the State claimed it was permissible to use a prior refusal to impose a criminal penalty "so long as the penalty is not assessed directly on the refusal." 2022 WI 37¸ ¶17. As the court recognized in rejecting this premise, "This supposed distinction makes no difference—both achieve the same unconstitutional result." *Id.*; *see also Dalton*, 2018 WI 85, ¶63 ("the fact that refusal is not a stand-alone crime does not alter our analysis."). Thus, it is not dispositive whether the PAC and IID charges directly impose criminal penalties on Mr. Sparby-Duncan for his prior refusal of a warrantless blood draw. What matters instead is the threat of criminal penalties that would not exist but for his prior refusal of a warrantless blood draw. Because he would not face the PAC and IID charges but for his exercise of a constitutionally-protected right, these charges are unconstitutional as applied to Mr. Sparby-Duncan.

CONCLUSION

For the reasons stated above, Mr. Sparby-Duncan respectfully requests that this Court reverse and remand to the circuit court with instructions to dismiss his PAC and IID charges.

Dated this 8th day of November, 2024.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 2,408 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules 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 or 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 one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 8th day of November, 2024.

Signed:
Electronically signed by
David Malkus
DAVID MALKUS
Assistant State Public Defender