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STATE OF WISCONSIN  
C O U R T O F A P P E A L S  
D I S T R I C T I I I

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Case No. 2024AP1012-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

NICHOLAS L. SPARBY-DUNCAN,

Defendant-Appellant.

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ON APPEAL FROM A NONFINAL ORDER  
DENYING A MOTION TO DISMISS  
ENTERED IN THE DUNN COUNTY CIRCUIT COURT,  
THE HONORABLE JAMES M. PETERSON, PRESIDING

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**BRIEF OF PLAINTIFF-RESPONDENT**

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## INTRODUCTION

Nicholas L. Sparby-Duncan appeals a circuit court order denying his motion to dismiss charges of failure to install an ignition interlock device (IID) and operating a motor vehicle with a prohibited alcohol concentration (PAC) above 0.02. He asserts that he was only required to have an IID installed on any vehicle he drove, and was only subject to the 0.02 limit, because he refused a warrantless blood draw in 2008. Sparby-Duncan argues that because his current charges threaten criminal punishment for refusing a blood draw, in violation of *State v. Forrett*, 2022 WI 37, 401 Wis. 2d 678, 974 N.W.2d 422, the statutes under which he is charged are unconstitutional as applied to him.

But *Forrett* held only that it is impermissible to use a revocation for refusing a warrantless blood draw as a prior conviction to enhance the sentence for a subsequent OWI or PAC conviction. That is far afield from the situation in this case.

Here, the consequence of Sparby-Duncan improperly refusing a warrantless blood draw in 2008 was that his operating privilege was revoked. When he was later convicted of operating a motor vehicle with a restricted controlled substance in his blood (RCS) as a second offense in 2013, his 2008 refusal meant that he was required to have an IID installed in any motor vehicle he drove, and while he was subject to an IID order, he was prohibited from driving with an alcohol concentration above 0.02. These are permissible civil penalties and consequences. Sparby-Duncan's current charge for failing to install an IID is the result of his failure to comply with the condition that he install an IID. And his current charge for PAC is the result of his driving with an alcohol concentration above 0.02. His current charges are not criminal punishment for refusing a blood test in 2008. Since Sparby-Duncan's revocation for refusing a warrantless blood

draw is not being used to enhance the sentence for his current crimes, the circuit court correctly rejected Sparby-Duncan's argument that *Forrett* invalidates the charges in this case, and this Court should affirm.

### **ISSUE PRESENTED**

Are the IID and PAC statutes under which Sparby-Duncan is charged unconstitutional as applied to him because they criminally penalize his prior refusal to take a warrantless blood test?

The circuit court answered "no" and denied Sparby-Duncan's motion to dismiss the charges.

This Court should affirm.

### **STATEMENT ON ORAL ARGUMENT AND PUBLICATION**

The State does not request oral argument, as the arguments are fully developed in the parties' briefs. Since this Court converted this case from a one-judge appeal to a three-judge appeal, the State agrees with Sparby-Duncan that publication of this Court's opinion may be appropriate.

### **STATEMENT OF THE CASE**

Sparby-Duncan improperly refused a warrantless blood draw under Wisconsin's implied consent law in 2008. (R. 29:10.) He was not criminally punished for his refusal, as Wisconsin law does not criminalize a refusal of a test of a person's blood, breath, or urine under the implied consent law. Sparby-Duncan received a civil penalty for his refusal—his operating privilege was revoked. (R. 29:10.)

In 2013, Sparby-Duncan was convicted of RCS as a second offense. (R. 27:12.) His operating privilege was revoked, and the circuit court entered an order requiring him to have an IID installed in any vehicle he drove for one year

after his operating privilege was reinstated. (R. 27:2.)<sup>1</sup> The IID order meant that Sparby-Duncan was prohibited from driving with an alcohol concentration above 0.02 until he reinstated his operating privilege and had an IID installed for one year. Wis. Stat. § 340.01(46m)(c) (2013–14); Wis. Stat. § 343.301(2m) (2013–14.) Sparby-Duncan never reinstated his operating privilege, and never satisfied his IID order. (See R. 27:3.)

In 2022, Sparby-Duncan was arrested and cited with OWI as a third offense, operating a motor vehicle while revoked, and failure to install an IID. (R. 3.) The State later amended the OWI charge to a second offense after the Wisconsin Supreme Court held in *Forrett*, 401 Wis. 2d 678, ¶ 11, that a revocation for refusing a blood test cannot be used to enhance the sentence for a subsequent OWI-related conviction. (R. 5.) The State later added a charge of operating a motor vehicle with a PAC above 0.02 as second offense. (R. 14.)

Sparby-Duncan moved to dismiss the charges of failing to install an IID and operating a motor vehicle with a PAC above 0.02, asserting that those charges impermissibly relied on his 2008 revocation for refusing a warrantless blood draw. (R. 27.) The circuit court denied Sparby-Duncan’s motion, concluding that the order that he install an IID was a permissible civil penalty for refusing a blood test under *Birchfield v. North Dakota*, 579 U.S. 438 (2016), rather than an impermissible criminal penalty, and that a valid criminal punishment “could come from failing to install that ignition interlock,” just not from Sparby-Duncan’s 2008 refusal. (R. 41:5.) The court concluded that the “[s]ame reasoning

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<sup>1</sup> The IID order is not included in the appellate record. However, there is no dispute that an IID order was issued in Sparby-Duncan’s 2013 case. The State therefore cites to his motion to dismiss.

applies” to the charge of operating a motor vehicle with a PAC above 0.02. (R. 41:6–7.)

Sparby-Duncan filed a petition for leave to appeal the circuit court’s non-final order. (R. 39.) This Court granted the petition and converted the case from a one-judge appeal to a three-judge appeal. (R. 45.)

## ARGUMENT

**The circuit court properly rejected Sparby-Duncan’s argument that the IID and PAC statutes are unconstitutional as applied to him.**

**A. A defendant challenging the constitutionality of a statute has the burden to prove it is unconstitutional beyond a reasonable doubt.**

Every legislative enactment is presumed constitutional, and if any doubt exists about a statute’s constitutionality, this 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. McGuire*, 2010 WI 91, ¶ 25, 328 Wis. 2d 289, 786 N.W.2d 227.

**B. Sparby-Duncan has not shown that Wisconsin’s IID and PAC statutes are unconstitutional as applied to him.**

Sparby-Duncan challenges the constitutionality of Wisconsin’s IID and PAC statutes as they are applied to him. He was convicted of RCS as a second offense in 2013. (R. 27:12.) The circuit court also ordered that he have an IID installed in any motor vehicle he operated under Wis. Stat. § 343.301 (2013–14), “Installation of Ignition Interlock

Device,” which required the circuit court to enter an IID order if:

(a) The person improperly refused to take a test under s. 343.305.

(b) The person violated s. 346.63 (1) or (2), 940.09 (1), or 940.25 and either of the following applies:

1. The person had an alcohol concentration of 0.15 or more at the time of the offense.

2. 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 (2013–14); R. 27:2–3.) Here, the circuit court entered the IID order in 2013 because Sparby-Duncan drove drunk in violation of Wis. Stat. § 346.63(1), and he had a prior revocation for refusing in 2008. (R. 27:2–3.)

The IID order under Wis Stat. § 343.301(1g) prohibited Sparby-Duncan from operating a motor vehicle that is not equipped with an IID. Wis. Stat. § 343.301(1g)(am)1. The IID restriction was to begin on the day the order was issued and last for “not less than one year after the date [DOT] issues any license” to the person. Wis. Stat. § 343.301(2m)(a). While subject to an IID order under Wis. Stat. 343.301, Sparby-Duncan was prohibited from operating a motor vehicle with an alcohol concentration “of more than 0.02.” Wis. Stat. § 340.01(46m)(c).

Sparby Duncan did not install an IID as the circuit court ordered in 2013. (R. 27:3.) And he did not apply to have his driver’s license reinstated. As a result, his IID order never expired, and he remained subject to the 0.02 alcohol concentration limit. (R. 27:3.) When he was arrested in 2022, he was charged with failing to install an ignition interlock device in violation of Wis. Stat. § 347.413(1), and with operating a motor vehicle with a PAC above 0.02, in violation of Wis. § 346.63(1)(b) and Wis. Stat. § 346.65(2)(am)2.

Sparby-Duncan argues that his charges for failing to install an IID and operating a motor vehicle with a PAC above 0.02 are unconstitutional because they “rest on his prior refusal to submit to a warrantless blood draw.” (Sparby-Duncan’s Br. 9, 13.) He relies on *Birchfield*, *State v. Dalton*, 2018 WI 85, 383 Wis. 2d 147, 914 N.W.2d 120, and *Forrett*, 401 Wis. 2d 678. But the connection between Sparby-Duncan’s prior refusal and his current charges is indirect at best, and none of those cases render Wisconsin’s IID or PAC statutes unconstitutional as applied to him.

In *Birchfield*, the United States Supreme Court addressed the validity of implied consent laws that “impose penalties on motorists who refuse to undergo testing when there is sufficient reason to believe they are violating the State’s drunk-driving laws.” *Birchfield*, 579 U.S. at 444. The issue in *Birchfield* was whether laws that “go beyond” suspension or revocation, and “make it a crime for a motorist to refuse to be tested after being lawfully arrested for driving while impaired,” “violate the Fourth Amendment’s prohibition against unreasonable searches.” *Id.*

The Court held that a breath test may be conducted incident to a lawful arrest, without a warrant. *Id.* at 474. But the Court concluded that a blood test may *not* be conducted incident to a lawful arrest. *Id.* at 475–76.

The Court then considered whether an implied consent law may condition a driver’s driving privilege on his consent to a blood test when an officer with probable cause that the person has driven drunk requests a blood test. *Id.* at 476–77. The Court made it clear that a State *may* condition a person’s driving privilege on his consent to take a lawfully requested blood test. It said that a State may “insist upon an intrusive blood test,” and may threaten and impose civil penalties and consequences for withdrawing that implied consent and refusing to take a lawfully requested blood test: “[N]othing we say here should be read to cast doubt on” implied consent laws

“that impose civil penalties and evidentiary consequences on motorists who refuse to comply.” *Id.* at 476–77.

But the Court drew a line between permissible and impermissible penalties and consequences for refusing a warrantless blood test that is not justified by a warrant exception: “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.* 477. While it is permissible to impose civil penalties and evidentiary consequences on a refusal to take a blood test, the Court said it is impermissible “also to impose criminal penalties on the refusal to submit to such a test.” *Id.* The Court explained “that motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense.” *Id.*

In *Dalton*, the Wisconsin Supreme Court concluded that imposing a longer sentence for an OWI conviction because the person refused a warrantless blood test in that case constituted criminalizing the refusal in violation of *Birchfield*. *Dalton*, 383 Wis. 2d 147, ¶¶ 59–61.

In *Forrett*, the issue was “whether it is unconstitutional under *Birchfield* and *Dalton* to increase the criminal penalty for a separate, subsequent OWI because, in a prior instance, the driver refused a warrantless blood draw.” *Forrett*, 401 Wis. 2d 678, ¶ 10. The Wisconsin Supreme Court held 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.” *Forrett*, 401 Wis. 2d 678, ¶ 20.

Here, the State initially cited Sparby-Duncan with OWI as a third offense, counting his 2008 revocation for refusing a warrantless blood draw as one of the predicate prior offenses. (R. 3.) But under *Forrett*, Sparby-Duncan’s 2008 revocation

for refusing a warrantless blood draw could not properly be used to enhance the sentence for his 2022 OWI charge. (R. 5.) Accordingly, the State amended the charge to a second offense in compliance with *Forrett*, and it later added a charge of PAC above 0.02, also as a second offense. (R. 14.)

Sparby-Duncan argues that it was also impermissible under *Birchfield*, *Dalton*, and *Forrett* for the State to charge him with a crime for failing to install an IID and for operating a motor vehicle with a PAC above 0.02, because he “would not face either of these charges today but for his prior exercise of a constitutionally-protected right.”<sup>2</sup> (Sparby-Duncan’s Br. 13.)

But as the circuit court recognized, Sparby-Duncan’s IID order was a civil penalty or consequence for refusing a blood draw, which is permissible under *Birchfield*. (R. 41:4–5); *Birchfield*, 579 U.S. at 477. And any potential criminal punishment would be for failing to install the IID. (R. 41:5.) *Birchfield*, *Dalton*, and *Forrett* say nothing even suggesting that a person has a constitutional right to not install an IID, or to violate an IID order. And none of those cases say that a person’s failure to comply with an IID order cannot be criminalized.

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<sup>2</sup> In *State v. Dalton*, 2018 WI 85, ¶ 61, 383 Wis. 2d 147, 914 N.W.2d 120, the Wisconsin Supreme Court recognized a constitutional right to refuse a warrantless blood draw. The United States Supreme Court has never recognized such a right, at least where a person is not threatened with jail for refusing. It has only recognized a constitutional right to be free from an unreasonable search. The State maintains that *Dalton*’s recognition of a constitutional right to refuse a blood draw even when a person is not threatened with a criminal penalty for refusing is inconsistent with *Birchfield*’s holding that a blood draw conducted with a person’s consent under an implied consent law that does not threaten a criminal penalty is a reasonable search that a person has no constitutional right to refuse, *Birchfield v. North Dakota*, 579 U.S. 438, 476–77 (2016).

Sparby-Duncan is correct that, but for his refusal in 2008, he would not have been subject to an IID order. But his argument that a criminal penalty for failing to comply with the IID order is really a criminal punishment for his refusal in violation of *Forrett* is wrong and reads that case too broadly.

*Forrett* held only that it is impermissible to “count a prior, stand-alone revocation resulting from a refusal to submit to a warrantless blood draw as an offense for the purpose of increasing the criminal penalty.” *Forrett*, 401 Wis. 2d 678, ¶ 14. Here, by contrast, Sparby-Duncan’s 2008 revocation for refusing a warrantless blood test is not being used as an offense for the purpose of increasing the criminal penalty. The charges in this case are not enhanced punishments for an OWI offender but punishments for a new crime: Sparby-Duncan’s disregard of the circuit court’s order to install an IID. An IID order has nothing to do with a search, whether a reasonable or unreasonable one, and Sparby-Duncan had no constitutional right to ignore it. *Forrett* therefore does not apply.

It also follows that the statute prohibiting a person under an IID order from driving with an alcohol concentration above 0.02 is not an enhanced criminal punishment for an OWI offender. A conviction for driving with an alcohol concentration above 0.02 will not result in a criminal punishment for refusing in 2008. It will be a criminal punishment for driving with a prohibited alcohol concentration in 2022.

Sparby-Duncan argues that *Forrett* applies to render his charges unconstitutional because “[w]hat matters” is “the threat of criminal penalties that would not exist but for his prior refusal of a warrantless blood draw.” (Sparby-Duncan’s Br. 15.) *Forrett* did not say that. It held only that it is impermissible to “count a prior, stand-alone revocation resulting from a refusal to submit to a warrantless blood draw

as an offense for the purpose of increasing the criminal penalty.” *Forrett*, 401 Wis. 2d 678, ¶ 14. Had Sparby-Duncan complied with the IID order by installing an IID, he would never suffer any punishment for failing to comply with that order.

The charge of operating a motor vehicle with a PAC above 0.02 likewise does not count a prior, stand-alone revocation resulting from a refusal to submit to a warrantless blood draw as an offense for the purpose of increasing the criminal penalty. A revocation for improperly refusing a blood test is counted only to prohibit a person from driving with an alcohol concentration above 0.02 rather than above 0.08. The use of the revocation for refusing in this case is therefore different than the use of the revocation for refusing in *Forrett*, where the fact of a revocation for refusing in a prior case meant that the driver would forever be subject to a longer criminal penalty if he was later convicted of an OWI-related offense in a future case.

Here, Sparby-Duncan’s 2008 revocation for refusing is not being used to enhance the sentence for a future offense. The only penalty for improperly refusing is revocation, and the consequences for the revocation include an IID order and the lowering of the applicable alcohol concentration from 0.08 to 0.02 during the time he was subject to the IID order. If Sparby-Duncan had simply installed an IID, he would not have been subject to any charge or penalty for failing to do so and would not have been subject to the 0.02 limit once the IID order expired. The charges against Sparby-Duncan are not for refusing a blood draw—they are for failing to install an IID and driving with a prohibited alcohol concentration while still subject to the IID order.

Sparby-Duncan has not satisfied his burden to show that the statutes are unconstitutional beyond a reasonable doubt. *McGuire*, 328 Wis. 2d 289, ¶ 25. He points to nothing in *Birchfield*, *Dalton*, *Forrett*, or any other case providing that

criminalizing a failure to install an IID when the order was the result of a revocation for refusing a blood test, or criminalizing driving with a prohibited alcohol concentration when the alcohol concentration was lowered because of a revocation for refusing a blood test is criminal punishment for refusing a blood test. Accordingly, this Court should affirm the circuit court's order denying his motion to dismiss the charges against him.

### CONCLUSION

This court should affirm the circuit court's order denying Sparby-Duncan's motion to dismiss.

Dated this 7th day of February 2025.

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 3063 words.

Electronically signed by:

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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 7th day of February 2025.

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