STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2024AP001104

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

DEVRON MICHAEL GREEN,

Defendant-Appellant.

REPLY BRIEF OF DEFENDANT-APPELLANT

ON APPEAL FROM A FINAL ORDER ENTERED IN
CIRCUIT COURT CASE NUMBERS 23TR7531, 23TR7816, AND 24TR2326
ON MAY 22, 2024, IN THE CIRCUIT COURT FOR WINNEBAGO COUNTY,
THE HON. TERESA BASILIERE PRESIDING

Respectfully submitted,

DEVRON MICHAEL GREEN,
Defendant-Appellant

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STATEMENT OF ISSUES

1. UNDER WIS. STAT. § 343.301(1g)(a), DOES A COURT HAVE THE AUTHORITY TO IMPOSE AN IGNITION INTERLOCK DEVICE WHEN MR. GREEN'S BAC WAS UNDER .15, HE HAD NO PRIOR CONVICTIONS, AND THERE WAS NEVER A DETERMINATION OF AN IMPROPER REFUSAL?

THE COURT ANSWERED YES

ARGUMENT

I. THE TRIAL COURT FAILED TO CONDUCT A REFUSAL HEARING UNDER § 343.305, AND THUS FAILED TO SATISFY § 343.301(1g)(a)1.

The Trial Court never held a hearing under § 343.301(1g)(a)1., and thus cannot impose an IID on Mr. Green. Under Wisconsin Statute § 343.301(1g)(a)1., a court shall order a person install an IID if "the person **improperly** refused to take a test **under s. 343.305**." (emphasis added). The court requirements and procedures for an IID are the same as a refusal revocation. Wis. Stat. § 343.305(10m). A person who refuses to take an evidentiary chemical test is issued a "notice of intent to revoke" by the officer who requested the test. Wis. Stat. § 343.305(9)(a). Once given that notice, the person can demand a hearing on their pending revocation. Wis. Stat. § 343.305(9)(a)4. The issues of that hearing are limited to: whether the officer had probable cause to believe the person was operating while under the influence of drugs or alcohol, whether the officer properly notified the person of their ability to request a hearing, and whether the person actually refused to permit the test. Wis. Stat. § 343.305(9)(a)5. The court must determine these issues at the close of the hearing, or within five days thereafter. Wis. Stat. § 343.305(9)(d). All issues must be adverse to the person for there to be a refusal. *Id*. When a hearing for a refusal has been requested, the revocation period begins 30 days after the court determines if the person improperly refused under sub. (9)(d). Wis. Stat. § 343.305(10)(a). The Supreme Court has stated that the time limits directing court hearings in § 343.305(10)(a)

are mandatory. *Vill. of Elm Grove v. Brefka*, 2013 WI 54, ¶ 43, 348 Wis. 2d 282, 832 N.W.2d 121.

The Circuit Court never held a refusal hearing, and therefore could not order Mr. Green to install an IID under § 343.301(1g)(a)1. In this case, the refusal was dismissed and Mr. Green pled guilty to the underlying OWI. There was not a refusal hearing as required by § 343.305(9)(a). None of the issues outlined in § 343.305(9)(a)5. were proven, such as: the officer lacked probable cause, that the officer failed to notify him of his rights to a hearing, and, most importantly, there was no testimony or evidence of whether Mr. Green actually refused to permit the test. Because there was no refusal hearing, the trial court did not adversely determine all issues according to § 343.305(9)(d). At Mr. Green's sentencing hearing, the Honorable Judge Basiliere did not adversely decide the officer had probable cause, nor that the officer had actually notified Mr. Green of his right to a refusal hearing, and though Judge Basiliere did determine "there was a refusal," the Court importantly did not state whether it was improper or not.

Because the Court never held a refusal hearing, and because it clearly violated the procedure laid out in Wisconsin's statutes, its order requiring Mr. Green install an IID should be reversed.

II. *City of Wausau v. Fischer* IS NOT ANALOGOUS TO THIS CASE.

The State has overly relied on *City of Wausau v. Fischer*, an unpublished opinion that bears little resemblance to Mr. Green's case. In *Fischer*, the defendant was scheduled for a refusal hearing and an OWI trial on the same day in a

municipal court. *City of Wausau v. Fischer*, 2021 WI App 67, ¶ 3, 399 Wis. 2d 389, 965 N.W.2d 176 (unpublished). When the day came the defendant pled guilty to the OWI, stipulated that there was a proper basis for the stop, her arrest, and that she was read the "Informing the Accused" form. *Id*. The defendant then moved to dismiss the refusal. *Id*. Before dismissing, the municipal court held a hearing where the only issue before it was whether there had been a refusal to consent to the blood draw. *Id*. The municipal court heard evidence on that issue and found that the defendant had improperly refused to submit to an evidentiary test of her blood and imposed an IID. *Id*. at ¶ 4.

The defendant appealed to Marathon County Circuit Court, where it ruled that the municipal court was required to order the installation of the IID if it found there was an improper refusal, whether the refusal was dismissed. *Id*. at ¶ 5. A month later, the defendant filed a motion to reconsider, which was rejected. *Id.* at ¶¶ 5-6. Three months later she filed a motion for relief of judgment under Wis. Stat. § 806.07, this motion was also denied by the Marathon County Court. *Id*. at ¶ 7. Finally, the defendant appealed; the Court of Appeals ruled that it would only review the Circuit Court's denial of the defendant's motion for relief of judgement, because all other issues in the case were untimely. *Id.* at ¶ 12. Reviewing only that issue, the Court of Appeals found that there had been no erroneous exercise of discretion when Marathon County Court refused to grant the defendant relief from judgement, focusing on the facts that she had failed to state what basis she brought the claim under and that she had failed to show the Circuit Court why it took her

five months to file a claim. *Id* at ¶¶ 19-21. The Court of Appeals never actually addressed whether the Municipal court should have ordered an IID. *Id*.

In this case Mr. Green never stipulated that there was a proper basis for the stop or his arrest, nor did he stipulate that he was read the Informing the Accused form. Further, unlike in *Fischer*, the Court did not hold a hearing with the purpose of determining if there had been a refusal to consent to an evidentiary test. This makes *Fischer* factually distinct from this case.

Beyond factual distinctions, the State has improperly relied upon *Fischer* because it does not say what the State purports it does. The State cites to paragraph six of *Fischer* and says, "the trial court (first reviewing court) found that Wis. Stat. § 343.301 required the municipal court to order an interlock if, just like Mr. Green's case) it found that Ms. Fischer had improperly refused regardless of whether the refusal citation was dismissed." Brief of Respondent at 4. There are numerous issues with this statement and the State's argument. First, the State cites the opinion of Marathon County Circuit Court, a trial court. Circuit court decisions are not binding on the court of appeals – they are not even persuasive. The fact that the circuit court was the first reviewing court does not alter the fact that it is on a lower tier in Wisconsin's judicial hierarchy. Second, the paragraph the State cites (and every other *Fischer* paragraph they cited) comes from the "Background" section of the decision, describing the procedural history. Finally, the Court of Appeals never determined if the municipal court decision or the circuit court

interpretation were correct, as those issues were not timely appealed by the defendant in *Fischer*.

Because the facts of this unpublished case cited by the State are distinguishable from Mr. Green's case, and the opinions the State points to are the opinions of a circuit court that were not adopted by the Court of Appeals, this section of the State's argument should be disregarded.

III. FORCING A PERSON TO INSTALL AN IID FOR A REFUSAL, WHEN THEY HAVE ALREADY PLED GUILTY TO THE UNDERLYING OWI, VIOLATES BASIC POLICY PRINCIPLES OF WISCONSIN'S IMPLIED CONSENT LAWS.

Enforcing an IID for a refusal against a person who already pled guilty to the underlying OWI violates the basic policy principles of implied consent laws.

Wisconsin's implied consent law is designed to induce people to consent to evidentiary searches, whether they are under the influence of intoxicants or not. *State v. Brooks*, 113 Wis. 2d 347, 348, 335 N.W.2d 354 (1983). The Supreme Court held that once a person pleads guilty to an underlying OWI, the associated refusal penalties become unnecessary. *Id*. at 348-49.

When Mr. Green pled guilty to the underlying OWI, the associated refusal penalties (in this case an IID) became unnecessary. To enforce refusal penalties at the sentencing phase would go directly against Supreme Court case law in *Brooks*. Additionally, if courts are allowed to enforce refusal penalties on people after the refusal has been dismissed and without holding a hearing, would prosecutors always dismiss refusals and bring them up later at sentencing? Could courts then enforce

refusals against people who were never cited/charged? Would refusal hearings (and their associated statutes) become a mere dead letter? For these legal and policy reasons the trial court's order should be reversed.

IV. THE STATE HAS INCORRECTLY STATED THE STANDARD OF REVIEW IN THIS CASE.

The State argues that the standard of review is "sufficiency of the evidence" in this case, when in fact it is *de novo* because it presents a question of law. Questions of legislative intent, statutory construction, and the authority of different bodies of government all present questions of law. *Eastman v. Madison*, 117 Wis. 2d 106, 112, 342 N.W.2d 764 (1983). Appellate courts decide questions of law without giving special consideration to the determination of the lower court. *Id.*; *see also Glover v. Marine Bank of Beaver Dam*, 117 Wis. 2d 684, 691, 345 N.W.2d 449 (1984).

Mr. Green's case presents a question of whether the trial court had the statutory authority to issue an order forcing Mr. Green to install an IID when the underlying refusal charge had already been dismissed. For that reason, the Court of Appeals should review this case *de novo* in accordance with prior precedence and give no special consideration to the determination of the trial court.

CONCLUSION

For the above-listed reasons, and the reasons stated in the Defendant-Appellant's initial brief, the Circuit Court's order forcing Mr. Green to install an IID should be reversed.

Dated October 25, 2024.

Respectfully submitted,

Electronically signed by Saša Johnen

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CERTIFICATIONS

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 12 pages, 2081 words.

Dated this 25th Day of October 2024.

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