STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appellate Case No. 2025AP392

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

JEFFREY LEE BUSS,

Defendant-Appellant.

APPEAL FROM AN ORDER OF JUDGMENT ENTERED IN THE CIRCUIT COURT FOR DODGE COUNTY, BRANCH III, THE HONORABLE JOSEPH G. SCIASCIA PRESIDING, TRIAL COURT CASE NO. 2022-TR-292

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. THE ACCUSED IN A DRUNK DRIVING CASE MUST EXPRESSLY REVOKE THEIR CONSENT, OTHERWISE, THE PREVAILING COMMON AND STATUTORY LAW DICTATES THAT THEIR CONSENT HAS NOT BEEN REVOKED.

The State's rebuttal argument rests heavily upon the court's decision in State v. Prado, 2021 WI 64, 397 Wis. 2d 719, 960 N.W.2d 869, for the proposition that the implied consent law requires "actual" consent versus "deemed" consent. State's Response Brief, at pp. 8-10 [hereinafter "SRB"]. Mr. Buss does not take issue with this distinction. What he is taking issue with is this: whether, *when offered the choice to submit to or refuse a test as the implied consent statute requires*, a defendant's silence is sufficient to satisfy that standard.

In other words, the *Prado* court was examining whether a person who is ***unconscious or otherwise incapable of withdrawing consent*** can be presumed to have consented to a test. *Id* ¶ 9. The *Prado* court expressly noted that "[w]hen a suspect is unconscious or incapacitated, **that person obviously cannot respond to the choice presented** by the 'Informing the Accused' form." *Id.* ¶ 24 (emphasis added). Mr. Buss' point in this appeal is that, *because he was conscious*, he was capable of "responding" and silence *is* a form of response which, under the prevailing common law, is assent. *See* Appellant's Initial Brief, Section I.B.1., at pp. 8-9. As the Wisconsin Supreme Court has held, **silence in response to a statement may constitute an admission of assent if it is more reasonably probable than not that one would dissent if the statement were incorrect**. *Pawlowski v. Eskofski*, 209 Wis. 189, 197, 244 N.W. 611, 614 (1932). As the *Pawlowski* court observed, "'the inference of assent (by silence) may safely be made only when no other explanation is equally consistent with silence; . . . .'" *Id*. quoting 2 Wigmore, *Evidence*, § 1071 (2d ed. 1915). Mr. Buss' equating the "deemed" language set forth in Wis. Stat. § 343.305(2) is not intended to undermine the *Prado* decision, but rather, is intended to identify that when a person is otherwise conscious and *capable of withdrawing their consent*, their silence "is consistent with" consent because "the inference of assent . . . may safely be made" by silence in light of "deemed" consent.

In furtherance of its argument, the State then relies upon a quote from *State v. Padley*, 2014 WI App 65, 354 Wis. 2d 545, 849 N.W.2d 867, which it lifted from the *Prado* decision. SRB at p.10. What is notable about the quotation the State adopts is the *context* in which it was made. More particularly, the State emphasized in bold

language a portion of the *Padley* quote which provides "[t]he existence of this 'implied consent' does not mean that police **may require** a driver to submit to a blood draw." SRB at p.10 (emphasis added), quoting *Padley*, 2014 WI App 65, ¶ 26. That is, the issue which the *Padley* court was addressing centered on whether a blood draw could be *compelled* under the implied consent statute because of the "deemed" consent provision in the statute and not whether, once a suspect has been offered the choice to consent *vis a vis* the recitation of the Informing the Accused form, the defendant's silence should be considered a refusal of the requested test.

Ultimately, the State's rebuttal reaches the point at issue in this case when it correctly observes that "a verbal refusal to submit to a blood alcohol test is not required to find a refusal, as **conduct** may also serve as the basis for finding a refusal." SRB at p.11 (emphasis added), citing *State v. Rydeski*, 214 Wis. 2d 101, 106, 571 N.W.2d 417, 419 (Ct. App. 1997). Mr. Buss concurs that "conduct" is relevant in these circumstances. However, where the parties part company is whether *silence* should be construed as a consent to testing or a refusal thereof. *For persons who are conscious and have been read the Informing the Accused Form*, Mr. Buss contends that silence should not be construed as a refusal because of the fact that (1) a licensed driver has been "deemed" to have given their consent to testing and (2) the prevailing common law authority provides that assent may be given through silence.

The State next echoes the holding in *State v. Rydeski*, 214 Wis. 2d 101, 571 N.W.2d 417 (Ct. App. 1997), for the proposition that its construction of the law is correct and that Mr. Buss' ought to be rejected. SRB at pp. 11-12. There is a distinction between *Rydeski* and the facts of the instant case which distinguishes *Rydeski* sufficiently such that it is less than instructive. More specifically, the defendant in *Rydeski* engaged the officer in a lengthy conversation about whether he could use the bathroom after he had been read the Informing the Accused form. *Id*. at 104-05. Rydeski's *conduct* demonstrated that he was engaged in an attempt to either avoid or delay testing. The circumstances of Mr. Buss' case are, however, utterly distinguishable in that he made no effort to distract the arresting officer or otherwise impede testing—he simply remained silent. It is this conduct which is at issue in this matter and *not* whether there were explicit uncooperative actions on the part of Mr. Buss to avoid testing.

In conclusion, this Court should not buy into the State's attempt to shift the focus of Mr. Buss' proposition on appeal to whether he is attempting to overrule *sub silento* prior holdings which distinguish "deemed" consent from "actual" consent. Instead, the narrow question before this Court is whether the common law presumes

that consent is given when a defendant remains silent, and Mr. Buss' references to the "deemed" consent language in the statute are proffered solely for the purpose of demonstrating how his silence *presumptively* should have been construed under the prevailing doctrine of "assent by silence."

CONCLUSION

Since the common law dictates that Mr. Buss had already been deemed to have given his consent to an implied consent test under Wis. Stat. § 343.305(2), and further, since the law recognizes that silence is to be construed as consent under the appropriate circumstances, his silence at the time he was asked to submit to a test cannot be interpreted as a refusal to submit to the same, and therefore, the decision of the court below should be reversed.

Dated this 18th day of August, 2025.

Respectfully submitted,

MELOWSKI & SINGH, LLC

Electronically signed by:
Dennis M. Melowski
State Bar No. 1021187
Attorneys for Jeffrey Lee Buss

CERTIFICATION OF LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 1,245 words.

I also hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. § 809.19(12).

Dated this 18th day of August, 2025.

Respectfully submitted,

MELOWSKI & SINGH, LLC

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