18AP1022

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

RECEIVED
NOV 01 2018
CLERK OF COURT OF APPEALS
OF WISCONSIN

Case No. 2018AP1022

In the matter of the refusal of Robert E. Hammersley:
OCONTO COUNTY,

Plaintiff-Respondent,

v.

ROBERT E. HAMMERSLEY

Defendant-Appellant.

Appeal from a Judgment of Refusal
Entered in Oconto County Circuit Court,
Judge Michael T. Judge, Presiding

BRIEF AND APPENDIX OF DEFENDANT -APPELLANT

Robert E. Hammersley
The Petitioner, *Pro Se*

309 Bayside Road
Little Suamico, WI 54141
(920) 434-9322

TABLE OF CONTENTS

TABLE OF CONTENTS

CASES CITED

FEDERAL CASES CITED

UNITED STATES CONSTITUTION

WISCONSIN CONSTITUTION

STATUTES CITED

Wisconsin Statutes

PERSUASIVE AUTHORITIES

ISSUE PRESENTED

Should the Oconto County Circuit Court Have Heard and Granted Hammersley's 806.07 Motion and Have Voided the 1995 Refusal Judgment Against Hammersley?

The Honorable Michael T. Judge failed to give meaningful notice of denial from the initial date of filing, on April 25, 2018, through the appeal filing date of May 30, 2018. At first, Hammersley was questioned by the Oconto County Clerk of Courts about the filing. The Clerk actually refused to file the 806.07 Motion. After some patiently coordinated responses to the Clerk, she finally, took receipt of the Motion and filed it. As, she sternly admonished Hammersley, that the judge would not even consider this, 1995-traffic-violation's motion. As if on que, the very next day, Honorable Michael T. Judge answered to the filing, on April 26, 2018, with a flippant letter about not considering the motion nor the application of Birchfield's holding (*See Letter. App. 115*), and, from that point onwards, there were no more responses from the trial court to the Appellant. Hammersley questioned, in a letter, on May 2, 2018, "if the letter, was a final order that was appealable?" (*See Letter. App. 116*). Hammersley awaited a response, and then initiated a telephone conversation with the judicial assistant, on May 30, 2018, to learn that the judiciary would continue to be unresponsive regarding Hammersley's filing.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Whatever the Court determines appropriate.

STATEMENT OF THE CASE AND FACTS

1. On October 28, 1995, Hammersley was requested to submit to a test, as provided under **Wis. Stat. § 343.305(3)**, (1995-1996), and refused. Hammersley was subsequently arrested for violation of **Wis. Stat. § 346.63(1) (a)**, (1995-1996).

2. On December 4, 1995, the Oconto County Court issued the Notice of Intent to Revoke Operator's license. (*See Clerk Printout. App. 101*).

3. On December 7, 1995, the Oconto County Clerk of Courts filed the Notice of Intent with the court and delivered it to the Dept. of Motor Vehicles. (*See Notice of Intent. App. 102*).

4. On December 12, 1995, the Oconto County Court entered a civil judgment for refusal (eight days after issuance), against Hammersley. (*See Judgment of Refusal. App. 103*).

5. On February 26, 1996, Hammersley was convicted of a violation under **Wis. Stat. § 346.57(2)**, (1995-1996), with an accompanying stipulation and order. (*See Stipulation and Order. App. 104-105*).

6. On January 4 2012, Hammersley filed a writ of habeas corpus attacking the **refusal judgment's use**, as an enhancer. As Hammersley had **a speeding violation** as a result of this event. Appeal No. 2012AP19-W.
   a) Hammersley's writ of habeas corpus was denied on March 22, 2012. (*See Denial. App. 106-107*).
   b) Hammersley submitted a motion for reconsideration. (No, longer has a copy of this).
   c) Hammersley's motion for reconsideration was denied on April 12, 2012. (*See Denial. App. 108*).

7. On December 28, 2012, Hammersley filed an 806.07 motion attacking the refusal judgment with the Oconto County Court.
   a) Hammersley's 806.07 motion was denied on February 13, 2013.
   b) Hammersley submitted a motion for reconsideration on March 3, 2013.
   c) Hammersley's motion for reconsideration was denied on May 20, 2013, by an oral decision.

8. On June 3, 2013, Hammersley appealed this decision. Appeal No. 2013AP1263.
   a) Hammersley's appeal was denied on March 18, 2014.
   b) Hammersley submitted a motion for reconsideration on April 4, 2014.
   c) Hammersley's motion for reconsideration was denied on April 9, 2014.

9. On April 14, 2014 Hammersley appealed this decision. Appeal No. 2013AP1263.
   a) Hammersley's petition for review was denied on September 25, 2014 and was remitted to the Oconto County Court.

10. On April 25, 2018 Hammersley filed an 806.07 motion (*See 806.07 Motion. Affidavit. App. 109-14*).
    a) Hammersley received a letter from Judge Judge, dated April 26, 2018. (*See Letter. App. 115*).
    b) Hammersley sent a letter to Judge Judge, dated May 2, 2018. (*See Letter. App. 116*).
    c) Hammersley Called the judicial assistant and learned Judge Judge will not communicate with him relating to the motion filed on May 31, 2018 and will not take any further action regarding it.
    d) On May 31, 2018, Hammersley appealed this decision. Instant Appeal No. 2018AP1022.

ARGUMENT

The Oconto County Circuit Court should have heard and granted Hammersley's 806.07 Motion and issued an order to vacate and void the Refusal judgment.

Based on the proceeding seven, highlighted issues, through application of the holding in Birchfield, as each relates in a separate way to uniquely establish the controlling position of Birchfield directly relating retroactively to each of the following issues:

ISSUE ONE: NO EXIGENT CIRCUMSTANCES TO JUSTIFY WARRENTLESS BLOOD DRAW

BACKGROUND

On October 28, 1995, Hammersley was sleeping in his car in the parking lot at the hospital in Oconto Falls, Wisconsin. (*See Affidavit of Robert E. Hammersley,* hereinafter "Aff.", at 1 ¶2. App. 113). A police officer approached Hammersley's vehicle, woke him up, and performed a breathalyzer test on him, even though his vehicle was parked with the engine off and Hammersley was not attempting to drive it. (*See Aff.* at 1 ¶3. App. 113). The officer then arrested Hammersley, took him inside the hospital, and demanded that he submit to a blood test. (*See Aff.* at 1 ¶4. App. 113). Hammersley refused to allow his blood to be drawn without a warrant. (*See Aff.* at 1 ¶5. App. 113).

AUTHORITIES

State v. Trahan, 886 N.W.2d 216 (Minn. 2016) and State v. Thompson, 886 N.W.2d 224 (Minn. 2016) held that the test-refusal statute's application was unconstitutional, as no exigent circumstances existed to justify law enforcement's right to test the blood, without first, having to get a warrant to test the blood.

In, Birchfield, U.S. 136 S. Ct. (2016), The United States Supreme Court held that warrantless blood draws are unconstitutional because such blood draw demands, violate the Fourth Amendment to the United States Constitution.

ARGUMENT

No exigent circumstances existed to justify law enforcement taking a warrantless blood draw of Hammersley's blood. The refusal judgment was void *ab initio*, invalid under the *due process* provisions of the United States Constitution. Beginning, from the actual point, in time, of its original commencement, and of its enforced effect. The Birchfield holding is a substantive rule that must be applied retroactively.

ISSUE TWO: PROCEEDINGS BASED ON WARENTLESS BLOOD DRAWS ARE UNCONSTITUTIONAL, THE TEN-DAY DEADLINE FOR ADMINISTRATIVE HEARING REQUEST WAS NOT HONORED, AND JUDGEMENT WAS ENTERED WITHOUT PROPER NOTICE

BACKGROUND

I. On December 4, 1995, the Oconto County Court issued the Notice of Intent to Revoke Operator's license.
II. A Notice of Intent to Revoke Operator's License was filed in this case, on December 7, 1995.
III. An Order of Revocation was issued in this case under **Wis. Stat. § 343.305(10)**, (1995-1996), on December 12, 1995.

AUTHORITIES

Held in, United States v. United States Gypsum Co., 333 U. S. 364, 395 (1948), and reaffirmed in Anderson v. Bessemer City, 470 U. S. 564, 573 (1985), that "` [a] finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'"

In, Birchfield, U.S. 136 S. Ct. (2016), The United States Supreme Court held that refusal proceedings based upon the refusal to submit to a warrantless blood draw are unconstitutional because such blood draw demands, violate the Fourth Amendment to the United States Constitution.

ARGUMENT

The Oconto County Circuit Court erred when it entered the refusal judgment after only eight days preceding the issuance of the notice of intent to revoke, when the statutory language proscribes a ten-day period. And that the underlying judgement was based on an unconstitutional warrantless blood draw. The refusal judgment was void *ab initio*, being invalid, from the start, under the United States Constitution *due process provisions*. The Birchfield holding is a substantive rule that must be applied retroactively.

ISSUE THREE: PROCEEDINGS BASED ON WARENTLESS BLOOD DRAWS ARE UNCONSTITUTIONAL, THE STIPULATION PROCEEDING AND ITS RESULT ARE INVAILD

BACKGROUND

I. On February 26, 1996 Hammersley was convicted of a violation under **Wis. Stat. § 346.57(2)**, (1995-1996), with an accompanying stipulation and order.

AUTHORITIES

Held in, United States v. United States Gypsum Co., 333 U. S. 364, 395 (1948), and reaffirmed in Anderson v. Bessemer City, 470 U. S. 564, 573 (1985), that "` [a] finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'"

In, Birchfield, U.S. 136 S. Ct. (2016), The United States Supreme Court has recently held that proceedings based upon the refusal to submit to a warrantless blood draw are unconstitutional because such blood draw demands, violate the Fourth Amendment to the United States Constitution.

ARGUMENT

The Oconto County Circuit Court erred when it entered the stipulation and order, on February 26, 1996. with an accompanying conviction of a violation under **Wis. Stat. § 346.57(2)**, (1995-1996). The underlying stipulation and order's proceedings were based on an unconstitutional warrantless blood draw. The stipulation and order were void ab initio, invalid under the provisions of *due process* under the United States Constitution. Beginning, from the actual point, in time, of its original commencement, and of its enforced effect. The Birchfield holding is a substantive rule that must be applied retroactively.

ISSUE FOUR: THIS UNCONSTITUTIONAL REFUSAL JUDGEMENT WAS RESULTING FROM THE INEFFECTIVE ASSISTANCE OF COUNSEL

BACKGROUND

Hammersley was represented in this matter by Atty. Charles R. Koehn, who negotiated a plea bargain with the County. (*See 806..07 Motion at 2 ¶7. App. 110*). Atty. Koehn did not inform Hammersley that there was a valid challenge to the refusal revocation at any time before or during the plea proceedings. (*See 806..07 Motion at 2 ¶8. App. 110*). Hammersley entered a plea to a charge of Unreasonable and Imprudent Speed based on Atty. Koehn's advice, because he told him that this would prevent any alcohol-related offense being on his driving record. (*See 806..07 Motion at 2 ¶9. App. 110*). Hammersley was not actually guilty of said charge, and could not have been, because he was not operating his vehicle when approached by the officer. (*See 806..07 Motion at 2 ¶10. App. 110*).

AUTHORITIES

Birchfield, U.S. 136 S. Ct. (2016), proceedings based upon the refusal to submit to a warrantless blood draw are unconstitutional because such blood draw demands, violate the Fourth Amendment to the United States Constitution and, was ill-counseled, in violation of the Sixth and Fourteenth Amendments to the United States Constitution, and, Article I, § 7 of the Wisconsin Constitution.

ARGUMENT

Had Hammersley known that the refusal order would be on his record and treated as an alcohol related occurrence, he would not have entered a plea to any charge but would have insisted on going to trial to prove that he was not operating the vehicle at the time of the alleged incident. (*See 806..07 Motion at 2 ¶12. App. 110*). Hammersley submits that Atty. Koehn's erroneous advice to plead, and his failure to challenge the refusal proceedings in this case, deprived him of his right to the effective assistance of counsel, guaranteed him under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 7 of the Wisconsin Constitution, rendering his plea in this matter constitutionally invalid, from the original commencement, and enforced effect, under the Birchfield rule.

ISSUE FIVE: CRIMINAL PENALTIES HAVE BEEN ENFORCED AS A RESULT OF THIS JUDGEMENT IN ACTUAL SUBSEQUENT PROCEEDINGS

BACKGROUND

I. The refusal order, based on refusal to submit to a warrantless blood test, is counted as a "prior conviction" under **Wis. Stat. § 343.307(1)(f)** when determining the number of prior alcohol related convictions in a subsequent action.

II. The statutory penalty structure of **Wis. Stat. § 346.65(2)(am)** is based upon the number of prior "convictions" as determined by using the counting method set forth in **Wis. Stat. § 343.307**.

AUTHORITIES

Held recently by State v. Patrick H. Dalton, 2018 WI 85, held at ¶59 "Birchfield, dictates that criminal penalties may not be imposed for the refusal to submit to a blood test. 136 S. Ct. at 2185. A lengthier jail sentence is certainly a criminal penalty...", reaffirmed the SOCTUS ruling in Birchfield, U.S. 136 S. Ct. (2016), barring criminal sanctions previously imposed upon a subject for refusing to submit to warrantless blood tests.

ARGUMENT

This refusal is used as an enhancer and this use is unconstitutional. A lengthier jail sentence is certainly a criminal penalty. When basing lengthier sentences on invalid refusal judgements, there becomes a whole new tier structure towards stiffer criminal penalties for repeat offenders based on refusals. In Wisconsin, there is even the creation of a whole new crime based, in part, on refusal judgements, mandating a .02 Prohibited Alcohol Content or less and it has the same penalty effect as that counted OWI charge.

The Criminal sanctions imposed upon Hammersley for refusing to submit to this warrantless blood test are and have always been unconstitutional under the retroactive application of the Birchfield rule. This refusal was an invalid judgement, beginning, from the actual point, in time, of its original commencement, and its of enforced effect. The Birchfield, holding is a substantive rule that must be applied retroactively.

ISSUE SIX: THE 1995-1996 WISCONSIN REFUSAL STATUTE IS UNCONSTITUTIONAL BASED ON CRIMINAL PENALTIES FOR REFUSAL

BACKGROUND

I. The event stems from October 28, 1995. Wisconsin Statutes, 1995-1996, was prevailing law at the time of event and conviction.

AUTHORITIES

Held recently by State v. Patrick H. Dalton, 2018 WI 85, held at ¶59 "Birchfield dictates that criminal penalties may not be imposed for the refusal to submit to a blood test." Birchfield, U.S. 136 S. Ct. at 2185.

Wis. Stat. § 343.305, (1995-1996). (*See Copy of Wis. Stat. § 343.305, (1995-1996) Taken from archives online for Wisconsin legislature. App. 117-119*).

ARGUMENT

The 1995 Wisconsin refusal statute is unconstitutional based on criminal penalties for refusal, such as, a motor vehicle owned by the person may be immobilized, seized and forfeited or equipped with an ignition interlock device (*See Copy of Wis. Stat. § 343.305, (1995-1996). App. 117*), (and/or no specific mention of the imposition of impounding vehicles). The conduct of law enforcement is not defined in relation to the intimidating demeanor towards, questing of, and predispositions of suspected impaired drivers. Even due to the very nature of the arrest and investigation, it is a very threatening process. Even when there is consensual implied consent, it is still a very threatening process. A driver may be forced, by being bound in a gurney, to give a blood draw, even after giving consent on the form.

The 1995 Wisconsin refusal statute, in conjunction, with law enforcement's standard call procedures working in concert with intervention techniques through the application of the statute was, at that time, inherently unconstitutional. This refusal was an invalid judgement, beginning, from the actual point, in time, of its original commencement, and of its enforced effect. The Birchfield holding is a substantive rule that must be applied retroactively.

ISSUE SEVEN: TIMELINESS

BACKGROUND

I. Event stems from October 28, 1995.
II. On December 12, 1995, an, Order of Revocation was issued in this case, under **Wis. Stat. § 343.305(10)**, (1995-1996).
III. On February 26, 1996, Hammersley was convicted of a violation under **Wis. Stat. § 346.57(2)**, (1995-1996), with an accompanying stipulation and order.

AUTHORITIES

Neylan v. Vorwald, 121 Wis. 2d .481 (1984), holds that there is no time limit on an attack on a judgment or order as void.

Birchfield, U.S. 136 S. Ct. (2016), holds that its unconstitutional for being under threat of criminal consequences to refuse warrantless blood draws, that stem from events without the proper exigent circumstances to actually warrant a warrantless blood draw.

The current 2015-2016 Wisconsin Statutes (Statutes Viewable Online) and how interchangeable, they are with the 1995-1996 statutes, and this harmony predates the 1995-1996, statutes, as each, stand together in concurrence, as prevailing law now, and; as prevailing law then. Under **Wis. Stat. § 343.307(1)(f)**, the refusal order, based on refusal to submit to a warrantless blood test, is counted as a "prior conviction" when determining the number of prior alcohol related convictions in a subsequent action. And. The statutory penalty structure of **Wis. Stat. § 346.65(2)(am)** is based upon the number of prior "convictions" as determined by using the counting method set forth in **Wis. Stat. § 343.307**, counting refusal orders.

ARGUMENT

There is, no time limit, in vacating a judgment as void, that was void *ab initio* and "vacating a void judgment is mandatory not discretionary." The refusal judgment violated Hammersley's *due process rights* and is by its very-core-nature-invalid and contrary to the United States Constitution. The Birchfield holding is a substantive rule that must be applied retroactively.

RECOMMENDATIONS:

Hammersley is requesting that:

1) The refusal order dated December 12, 1995, in this matter become vacated;
   - ➢ And;

2) The violation, under **Wis. Stat. § 346.57(2)**, (1995-1996), with the accompanying Stipulation and Order, issued on February 26, 1996, become vacated and void.
   - ♦ And/Or; If such is granted, Or Both;

3) That, the Trial Court be instructed to complete these urgent and very necessary tasks speedily.
   - ➢ Insofar as:

I. The Birchfield decision renders the refusal revocation invalid, Hammersley is entitled to relief from this void portion of the Judgment herein under **Wis. Stat. § 806.07(1)(d)**.

II. Because the refusal revocation is invalid under Birchfield, this Order is subject to challenges under **Wis. Stat. § 806.07(1)(g)**, as enforcement thereof is no longer equitable.

III. Hammersley is entitled to relief from this Order under **Wis. Stat. § 806.07(1)(h)** to prevent the continuing possibility of its unconstitutional use under **Wis. Stat. § 343.307(1)(f)**.

IV. Hammersley is entitled to relief from the conviction of a violation under **Wis. Stat. § 346.57(2)**, (1995-1996), with an accompanying Stipulation and Order, issued on February 26, 1996, to become vacated and void, as these are invalid, under, the substantive, Birchfield rule, being applied retroactively, with the unconstitutional proceeding being based on the invalid refusal's use.

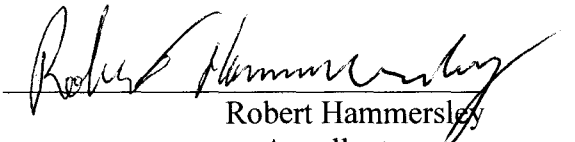
CONCLUSION

The refusal was invalid, beginning, from the actual point, in time, of its original commencement, and of its enforced effect, under the Birchfield rule. The Birchfield holding is a substantive rule that must be applied retroactively. This judgment is void. It is the duty of the court to annul this invalid judgment, under Neyland v. Vorwald, 124 Wis. 2d 85, 95, 368 N.W.2d 648, 654 (1985) at 97, citing Halbach v. Halbach, 259 Wis. 329, 48 N.W. 2d 617 (1952). Once again, Neylan v. Vorwald, 121 Wis. 2d .481 (1984), holds that there is no time limit to an attack on a judgment or order as void. And under, LaCrosse County v. Pettis, 2009 WI App. 77, 319 Wis. 2d 573, Id., at p8. vacating a void judgment is mandatory not discretionary. As the judgment was contrary to the United States Constitution's provisions of due process, and the court-lacked actual authority to enter it, under the Birchfield rule. The refusal judgment was void *ab initio* and "vacating a void judgment is mandatory not discretionary." *citing* LaCrosse County v. Pettis, 2009 WI App. 77, 319 Wis. 2d 573, Id., at p8.

WHEREFORE, for the above said facts, Hammersley asks that this court issue an order that the refusal judgement entered December 12, 1995, in Oconto County Case No. 1995TR003265, become Vacated and Void. As doing so is mandatory and not discretionary. And/or, that all of the requested recommendations, be adhered to.

Dated this 28th day of October, 2018.

Respectfully Submitted,



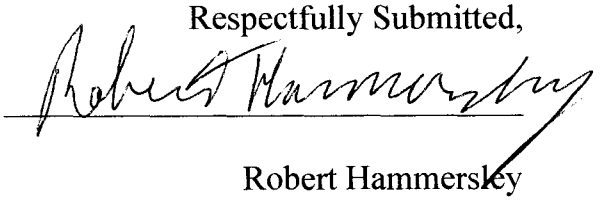
Robert Hammersley
Appellant, pro-se
309 Bayside Road
Little Suamico, WI 54141
(920) 434-9322

CERTIFICATION AS TO FORM AND LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19 in that it is: 3259 words, using a 12 point font.

Dated this 29th day of October, 2018.

Respectfully Submitted,



Robert Hammersley
Appellant, pro-se

309 Bayside Road
Little Suamico, WI 54141
(920) 434-9322

APPENDIX

INDEX
TO
APPENDIX

Page