STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT FOUR

State of Wisconsin,

Plaintiff – Respondent,

vs.

APPEAL # 21 AP 1111

Aman Deep Singh,

Defendant – Appellant.

REPLY BRIEF OF DEFENDANT – APPELLANT

On Appeal From An Order Denying A Writ of Coram Nobis and a Motion To Dismiss The Repeater and Reconsideration, Entered In The Dane County Circuit Court, The Honorable Nicholas McNamara Presiding.

(DANE COUNTY L.C. #04 CT 882)

Aman Deep Singh

Defendant – Appellant

ARGUMENT

I. § 973.13 RELIEF IS WARRANTED.

A. THIS COURT HAS ALREADY COMMUTED SINGH'S SENTENCE AND SHOULD REMAND TO CORRECT THE RECORD BY AMENDING THE JUDGMENT OF CONVICTION TO REFLECT THE COMMUTATION.

In the brief-in-chief (pgs. 2-5), Singh contends that this court has already commuted his sentence to a civil first offense OWI in an earlier appeal – *State v. Singh*, #17AP1609 (*Singh II*). The State responds with a terse and conclusory two sentence paragraph:

> "Given the aforementioned, it is absurd for Mr. Singh to claim that the Appellate Court already commuted or vacated his 2001 OWI first offense sentence. To draw this conclusion would require a willful ignoring of the Appellate Court's repeated past decisions." (State's brief, pg.1)

Since this is the first paragraph of the State's Argument, the "aforementioned" presumably refers to the Statement of Facts section. Also, Singh's claim concerns his 2005 OWI 2nd sentence not any 2001 conviction. In that aforementioned Statement of Facts, the State concedes that Singh's sentence ***was commuted*** in *Singh II*. "This court held that Mr. Singh was entitled to the one remedy allowed under § 973.13: "voiding of any penalty in excess of the statutory maximum."" (State's brief, pg. v) On remand, "Judge McNamara signed an order stating any excessive penalty was void, as that is the only remedy allowed Mr. Singh under § 973.13." (State's brief, pg. v-vi).

What Judge McNamara neglected to do however was amend the Judgment of Conviction to reflect the commutation. Per § 972.13, the Judgment is the official record of the conviction and sentence. "A judgment of conviction shall set forth the plea, the verdict or finding, the adjudication and sentence...." Wis. Stat. 972.13(3). The sentence ordered on the official Judgment of Conviction is the one the Sheriff carries out. "A copy of the judgment shall constitute authority for the sheriff to execute the sentence." Wis. Stat. 972.13(5). This Judgment of Conviction still incorrectly orders the original uncommuted sentence that this court held exceeded the statutory maximum in *Singh II*.

As Singh explained in his brief-in-chief with citations to the OWI penalty statutes, none of the terms (incarceration, fine and license revocation) of Singh's original sentence exceed the statutory maximums for a second offense. What they do each exceed are the statutory

maximums for a first offense OWI. What that should make plain is that this court's *Singh II* summary reversal commuted the criminal OWI second offense sentence to a civil first offense OWI. That sort of commutation is permitted under § 973.13 when the court concludes that the State improperly applied a repeater. See *State v. Spaeth*, 206 Wis. 2d 135, 156, 556 N.W.2d 728 (1996) (commuting a criminal repeater OAR conviction to a civil first offense OAR). Also, *State v. Hanson*, 2001 WI 70, 244 Wis. 2d 405, 628 N.W.2d 759. No language in *State v. Singh*, Appeal #18AP2412 (*Singh III*), which held that the sentence was not commuted to 'no sentence at all', contradicts this conclusion that *Singh II* did commute the sentence to a first offense by voiding the repeater.

This is not merely an academic exercise. Singh is substantially prejudiced by the incorrect Judgment of Conviction. Until this is resolved, no one knows whether further motions for relief should proceed under civil procedure or criminal procedure.[1]

B. BLOOD TEST REFUSALS CANNOT ENHANCE OWI SENTENCES. SINGH'S PRIOR IMPLIED CONSENT REFUSAL WAS FOR A BLOOD TEST.

State v. Forrett, 2021 WI App 31, 398 Wis. 2d 371, 961 N. W. 2d 702, holds that blood test refusals cannot count as prior offenses for OWI sentence enhancement. The State does not contest this interpretation. The State also does not challenge on appeal Singh's contention that his prior refusal was for a blood test. Therefore, the State concedes these points. See *Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

C. SINGH HAS NOT FORFEITED HIS RIGHT TO SEEK RELIEF BASED ON *FORRETT*.

The State does not contest on appeal that Singh's sentence was enhanced based on a prior blood test refusal. Nevertheless, the State argues that Singh has forfeited his right to seek relief based on *Forrett* because he failed to make the argument in a motion he filed in the trial court more than four years prior to *Forrett* back on January 4, 2017. The

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[1] *Singh II* commuted Singh's sentence by summarily reversing the trial court order denying §973.13 relief. However, this court neglected there and again in *Singh III* to specify what lesser terms Singh's sentence had been commuted to. This omission has now resulted in two consecutive appeals. Wis. Stat. 972.13 requires the Judgment of Conviction to accurately state the sentence. It makes no sense at all for this court to continue to refuse to explain to what lesser terms it commuted Singh's sentence.

State bases its forfeiture argument on *State v. Escalona-Naranjo*, 185 Wis.2d 168, 517 N. W. 2d 157 (1994) (State's brief, pg. 4)

Singh seeks relief under § 973.13 and *coram nobis*. As explained in the brief-in-chief (pg. 7 and pg. 9), this court has held that *Escalona* forfeiture does not apply to these procedures. "We further determine that neither the procedural bar in § 974.06(4) nor the public policy discussion contained in *Escalona-Naranjo* precludes criminal defendants from seeking relief from faulty repeater sentences under § 973.13." *State v. Flowers*, 221 Wis. 2d 20, 27, 586 N.W.2d 175 (Ct. App. 1998). "However, there is one important fact which distinguishes this scenario from the one faced by the court in *Escalona-Naranjo*. Unlike that defendant, Heimermann is no longer in custody on the charges. And because Heimermann is not in custody, he cannot make use of the remedies set out in § 974.06, STATS. As the supreme court forcefully explained in Jessen, "the remedy provided in sec. 974.06 is available solely to those persons in custody under sentence of a court." See Jessen, 95 Wis. 2d at 211, 290 N.W.2d at 687. Therefore, we hold that the trial court erred when it ruled that *Escalona-Naranjo* served to bar Heimermann from seeking a writ of *coram nobis*." *State v. Heimermann*, 205 Wis.2d 376, 385-386, 556 N.W.2d 756 (Ct.App. 1996).

Singh did raise this issue in the prior appeal, *State v. Aman Deep Singh*, #18AP2412 (*Singh III*). However, this court declined to consider it because Singh failed to raise it in the trial court first. The State apparently believes this also means Singh cannot later return to the trial court and properly raise the issue there. The only authority for that kind of rule is *Escalona*, and *Escalona* does not apply to claims cognizable under § 973.13 and *coram nobis*.

This situation has already arisen once before in this case history. In the first appeal, *State v. Aman Deep Singh*, Appeal # 15AP850 (*Singh I*), Judge Sherman refused to consider Singh's Sec. 973.13 excessive sentence claim because Singh raised it for the first time on appeal. See *Singh I*, ¶6, fn.4. Singh returned to the trial court and raised it there, and Judge Sherman later granted that Sec. 973.13 relief in *Singh II*.

D. IF FORFEITURE DOES APPLY, SINGH HAS SUFFICIENT CAUSE TO EXCUSE IT.

In the brief-in-chief (pg. 8), Singh asserts that a sufficient reason exists to excuse any forfeiture because *Forrett* is new case law that for the first time explicitly holds unconstitutional those OWI penalty statutes that count blood test refusals. The State argues that *Forrett* "was an extension and arose out of its decisions in *Dalton* and

Birchfield," so presumably arguments based on *Forrett* can be forfeited even before *Forrett* was decided.

This exact argument was rejected in *State v. Howard*, 211 Wis.2d 269, 287-288, ¶33-¶38, 564 N.W.2d 753 (1997). The Wisconsin Supreme Court explained that sufficient cause exists to excuse earlier forfeiture when the court announces "a new rule of substantive law". *Id* at ¶37. This is true even when an earlier defendant "had available to him all of the statutes, legislative history, and the rules of statutory construction" necessary to raise the novel argument. *Id* at ¶35. As highlighted in the brief-in-chief, this principle flows from the presumption of constitutionality of statutes and is consistent with other case law placing no obligation on police officers and defense attorneys either to recognize an unconstitutional statute before an appellate court explicitly announces such a holding.

E. THE FORRETT RULE IS SUBSTANTIVE AND RETROACTIVE.

In the brief-in-chief (pgs. 6-7), Singh argues that the new *Forrett* rule is substantive and retroactive. The State's argument to the contrary relies entirely on an unpublished one-judge court of appeals opinion, *Matter of Hammersley*, 2019 WI App 48, 388 Wis. 2d 476, 934 N.W.2d 578.[2] Since *Hammersley* predates *Forrett* by two years, it cannot possibly be persuasive on whether *Forrett* is retroactive.

Hammersley does briefly discuss the retroactivity of the earlier *Birchfield* opinion. "Hammersley never actually develops a coherent, non-conclusory argument for why it should apply retroactively. Newly declared constitutional rules apply "to all similar cases pending on direct review."" *Id* at ¶12. From this the court concluded that *Birchfield* cannot apply retroactively to Hammersley because his case is no longer on direct review. What is missing from this very cursory discussion is any reference to the substantial caselaw cited by Singh in the brief-in-chief about the mandatory retroactivity of new substantive constitutional rules, or any analysis of whether *Birchfield* announced a substantive or procedural rule. However, as explained in the brief-in-chief (pg. 6), the retroactivity of *Birchfield* is no longer the relevant inquiry. Rather, it is now the retroactivity of the new rule in *Forrett*.

The State appears to argue that because *Forrett* is an "extension" of *Birchfield*, then any decision on the retroactivity of *Birchfield* automatically controls the retroactivity of *Forrett*. This logic is

[2] The State has not complied with WIS. STAT. RULE 809.23(3)(c) requiring a party relying on an unpublished opinion to file and serve a copy of the opinion with the brief.

conclusory and unsupported by any case law. Whether *Forrett* is retroactive depends solely on the nature of the new constitutional rule it announces, not on the alleged retroactivity of any cases it cites to. New substantive constitutional rules are always retroactive, and Singh's arguments for why the new *Forrett* rule is substantive have gone unanswered in both the State's brief and in *Hammersley*.

II. THE WRIT OF *CORAM NOBIS* IS WARRANTED.

A. THE WRIT OF *CORAM NOBIS* IS WARRANTED TO REMEDY A VIOLATION OF A STATUTORY LIMITATION ON CONVICTION.

The State does not contest that § 345.52(1) was violated when Singh was prosecuted for OWI 2nd after his conviction for OWI 1st, nor does the State contest that § 345.52(1) is a statute of limitation / repose whose violation would bar the entry of the judgment. The State also does not contest that Singh never explicitly waived this defense prior to pleading guilty, nor does the State contest that the issue was never raised prior to conviction. All these points are therefore conceded. Instead, the State argues:

> "Nonetheless, he is unable to satisfy the second requirement for *coram nobis* relief because the error he complains of is not a factual error. Rather, it is a constitutional, and thus, legal issue. (citations omitted) Because Mr. Singh's double jeopardy claim presents a legal issue, it does not fall within the scope of coram nobis." (State's brief, pg 8-9)

The problem with the State's response is that Singh does not make any constitutional double jeopardy argument at all. (Singh did do so previously in *Singh I*, where this court ruled that it was beyond t he scope of the writ.) Instead, Singh argues that a statutory limitation on conviction was violated. A statutory limitation claim is a quintessential factual matter. It merely requires answering the simple factual question of whether the statutory limitation was present prior to the entry of judgment. Resolving whether § 345.52(1) was violated does not require applying any constitutional Double Jeopardy case law.

Furthermore, the scope of *coram nobis* does not prohibit addressing all questions of law, but rather only "errors of law and of fact appearing on the record". *Jessen v. State*, 95 Wis.2d 207, 214, 290 N.W.2d 685 (1980). As argued in the brief-in-chief (pgs. 11-12), determining the legal significance of facts that do not appear on the record and whether these facts would bar the entry of the judgment are questions very much within the scope of the writ of *coram nobis*.

The examples of errors where *coram nobis* was held appropriate mentioned in Singh's brief-in-chief (pg.9) include where a defendant was underage or deceased. Other examples include where a defendant was insane or a slave. See *United States v. Morgan*, 346 U.S. 502, 508 (1954). What all these examples have in common is that some statutory limitation against entry of judgment was violated.

A violation of § 345.52(1) is of the same nature as these other examples of statutory limitations. It bars a new OWI prosecution after a defendant has already been convicted of OWI for the same incident. Whether Singh had a previous conviction for OWI is plainly a question of fact, and also a fact that the State does not contest. Determining whether this fact of the prior conviction would bar the entry of the second conviction does not require conducting any constitutional double jeopardy analysis. A § 345.52(1) violation requires only the fact of the prior conviction, not any legal inquiry into whether Singh was previously placed in jeopardy.

In the brief-in-chief, Singh asserted that the trial court abused its discretion by denying the writ based on supposed equitable concerns on behalf of the State. Singh argued that it violated the 'clean hands doctrine' and that the State never advocated for equitable relief itself. In its response brief, the State neglects to respond to these arguments at all. Instead, the State makes only a conclusory statement that no abuse of discretion was alleged. (State's response brief, pg. 10) Therefore, the State concedes the points.

B. THE WRIT OF *CORAM NOBIS* IS WARRANTED TO REMEDY A *FORRETT* VIOLATION.

The State does not contest on appeal that Singh's prior Implied Consent violation was for refusing a blood test, nor does the State contest that determining whether this prior violation was for refusing a blood test vs refusing a breath test is a straightforward question of fact. The State also does not contest that the trial court was never informed prior to conviction that the prior refusal was for a blood test. The State does not contest that *Forrett* held it unconstitutional to consider blood test refusals as prior offenses for OWI sentence enhancement. Finally, the State does not contest the general proposition that if this prior blood test refusal cannot be counted, that circumstance would bar the entry of a criminal OWI conviction since Singh would have no prior offenses.

The State's only objection is that *Forrett* does not apply to Singh. It has already been briefed above that forfeiture rules do not apply to *coram nobis* proceedings, and that the new *Forrett* rule is substantive

and therefore retroactive. If *Forrett* is retroactive, then the State has conceded all the remaining points for granting a writ of *coram nobis*.

CONCLUSION

Singh respectfully urges the court to reverse the trial court orders denying § 973.13 relief and a writ of *coram nobis* and reconsideration.

Dated this 8th day of January 2022,

Aman Deep Singh